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JUSTIFYING MINORITY PREFERENCES IN BROADCASTING*

BY
MATTHEW L. SPITZER**

I. INTRODUCTION

In *Metro Broadcasting v. FCC*,¹ the Supreme Court upheld two Federal Communications Commission ("FCC" or "Commission") policies designed to increase the number of broadcasting stations owned by racial and ethnic minorities and, to a lesser extent, women. The FCC, prodded by early decisions of the Circuit Court of Appeal for the District of Columbia,² has claimed for almost two decades that by increasing the diversity of ownership of the airwaves it will increase the diversity of programming content. Hence, these policies—termed "minority preference policies"—are justified as a method of diversifying broadcasting content and not as a matter of remedying any past or present discrimination. In *Metro Broadcasting* the majority found more than enough evidence of a nexus between minority ownership of broadcasting stations and broadcast programming diversity to allow Congress and the FCC to adopt these policies. The dissent took a completely different view of the evidence (as well as everything else) and found that it was totally insufficient to justify the minority preference policies.³

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** William T. Dalessi Professor of Law, University of Southern California; Visiting Professor of Social Science, California Institute of Technology. I received valuable help from Antoinette Cook, Wilhelmina Cooke, Erwin Chemerinsky, Richard Craswell, Gary W. Cox, David Haddock, Thomas Hazlett, Margaret Radin, Florence Setzer, Pablo Spiller, and all of the participants at workshops on this Article at the University of Chicago Law and Economics Workshop, the Hoover Institute, the University of Illinois Department of Economics, the Yale University School of Organization and Management, and the 1989 Telecommunications Policy Research Conference.

1. 110 S. Ct. 2997 (1990).

2. *West Mich. Broadcasting Co. v. FCC*, 735 F.2d 601 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985); *TV 9 v. FCC*, 495 F.2d 929 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974).

3. See *infra* text accompanying notes 144-97. The split between the majority and dissent was preceded by similar disagreements in the courts below. In March 1989, the United States Court of Appeals for the District of Columbia Circuit issued two decisions, one striking down one of the

In this Article, I will concentrate on the justification for the minority preference policies—the purported connection between a broadcast station owner's race or sex and the owner's programming decisions. Do white males really program differently from black, Hispanic, Asian/Pacific Islander, Alaskan/American Indian, or female owners? If so, when and in what ways is this likely to be true?⁴

Before I begin answering these questions, however, I should highlight the nature of my enterprise. The Supreme Court accepted the FCC's justification of the minority preference policies on the theory that minority owners and female owners will program a different mix of material than will white male owners. This immediately raises two questions. First, why not just require broadcasters, regardless of race or sex, to program the special material that the FCC hopes minority and female owners will choose to put on the air? This would avoid the need for explicit racial classifications in the law. Second, why not justify the minority preference policies directly on the grounds that minorities and women have been victims of past discrimination and that these policies remedy past discrimination? This would avoid the need to show a relationship between owners' ethnic or sexual characteristics and programming choice.

Neither of the above questions can help us avoid the basic inquiry in this Article. First, directly requiring broadcasters to program special material presumably runs afoul of either the first amendment's guarantee of freedom of speech and press⁵ or the Communication Act's prohibition of censorship.⁶ The majority opinion in *Metro Broadcasting* held that

minority preference policies, *Shurberg Broadcasting v. FCC*, 876 F.2d 902 (D.C. Cir. 1989), *rev'd sub nom.*, *Metro Broadcasting v. FCC*, 110 S. Ct. 2997 (1990), and the other decision upholding another minority preference policy, *Winter Park Communications v. FCC*, 873 F.2d 347 (D.C. Cir. 1989), *aff'd sub nom.*, *Metro Broadcasting v. FCC*, 110 S. Ct. 2997 (1990).

4. This is part of a somewhat broader question about the relationship between owners' characteristics and programming. *E.g.*, H. LEVIN, *FACT AND FANCY IN TELEVISION REGULATION* (1980); Hale & Vincent, *Locally Produced Programming on Independent Television Stations*, 63 J. QUART. 562 (1986); Wirth, *Assured Diversity Is Needed*, L.A. Daily J., Aug. 29, 1984, at 4, col. 5 (discussing multiple-ownership rules).

5. U.S. CONST. amend. I.

6. 47 U.S.C. § 326 (1988). It is true that the FCC has, at many times in its history, imposed many content-based requirements on broadcasters, particularly in the area of nonentertainment programming. *See* Network Programming Inquiry, 25 Fed. Reg. 7291, 7295 (FCC 1960) (report and statement of policy) (requiring programming in 14 different categories, including programs for children, religious programs, educational programs, public affairs, editorials, politics, agriculture, news, weather, market reports, sports, minority programming, local self-expression, programs with local talent, and entertainment). Breaking down minority programming into the very narrow, specific

first amendment considerations mixed with considerations of administrative convenience relieve the FCC of any duty to try the racially neutral alternative of direct content control.⁷ Second, because neither the Commission nor Congress has ever justified the minority preference policies as remedial measures, neither the FCC nor Congress has ever developed a factual record that might support the remedial claim.⁸ Therefore, because the Court correctly held that the FCC cannot directly require minority programming, and because there is no factual record for any claim that the minority preference policies are remedial,⁹ the minority

categories needed to implement the minority preference policies directly, however, would be going too far.

There is also a secondary question. If the FCC may not constitutionally require minority programming directly, may the Commission justify the minority preference policies as an attempt to foster that diversity indirectly? Although the reader's instinctive response may be no, there are examples involving governmental involvement in communications in which the answer may be yes. For example, the government may set up a free speech area so as to foster a robust political debate, hoping that proponents of many different views will speak, but under the first amendment no one speaker may be required to offer any particular view. See *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788 (1985); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983).

7. See *infra* text accompanying notes 176-77.

8. In fact, at hearings before the Telecommunications Subcommittee of the Senate Committee on Commerce, Science, and Transportation, witnesses suggested developing such a factual record and offered to help do so. *Minority Ownership of Broadcast Stations: Hearing Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation*, 101st Cong., 1st Sess. (1989) [hereinafter *Hearing*] (statements of John Payton, James L. Winston, Executive Director and General Counsel of the National Association of Black Owned Broadcasters, and Percy E. Sutton).

9. Everyone agrees that, if a governmental unit has discriminated against minorities, it may lawfully use explicit racial guidelines to remedy that discrimination. However, the FCC has never claimed to have discriminated in the past, and it is not clear how the parties would go about proving such a thing if they were to try to do so. In the testimony at the Senate hearings, only one person even mentioned the possibility that the FCC had been guilty of discrimination, and he said that he knew of no evidence to support such an allegation. See *id.* (testimony of Allan Shurberg). If the FCC were subjected to nothing much more searching than the majority approach in *Metro Broadcasting*, it might carry its burden. Broadcast historians could probably be found to testify that during the 1950s the FCC was staffed by right-wing, racist Eisenhower appointees who would not even give licenses to rich, white Democrats. During this time the vast majority of valuable television licenses were handed out. Schwartz, *Comparative Television and the Chancellor's Foot*, 47 GEO. L.J. 655, 690-94 (1959). These commissioners, the historians would claim, would not have given the time of day, much less a valuable broadcast license, to a minority applicant. I have no clue as to the sources upon which they might rely. I made a first pass at the historical sources and found no direct evidence of racism on the part of the FCC.

On the other hand, if the FCC were to be subjected to some stricter burden of proof, proving past discrimination would be difficult. First, I suspect that very few minorities applied for licenses during the 1950s. I have found no historical evidence upon this point, and I know of no evidence to suggest the contrary. (This is a rational response to discrimination. Applying for a license is quite costly, and if the probability of getting the license is zero, it is irrational to apply.) However, in *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), Justice O'Connor indicated that, at a minimum, the government must compare the rate at which minorities applied for rights to the rate at which

preference policies must stand or fall upon the relationship between female or minority ownership and programming.¹⁰

My investigation of the possible relationship between female and minority ownership and programming will *not* ascertain whether or not there is enough evidence to satisfy a skeptical social scientist that the relationship exists. (I strongly suspect that there is not.) Instead, I will evaluate the theory and evidence of program choice against the background of the differing legal standards used by the majority and dissent in *Metro Broadcasting*. I will show that the distinction between the majority's and dissent's appraisals of the evidence flows directly from their different normative and jurisprudential approaches to explicit racial classifications.

In this Article, I will outline the content of the minority preference policies, pausing only briefly to review their history. Then I will present a basic model of programming choice by profit-maximizing broadcasters and modify it to incorporate the race and sex of the broadcast station owner. The model will reveal two possible reasons why minority and female owners might choose to program differently from white males.¹¹

they were awarded to show discrimination. *Id.* at 498-503; see *infra* notes 192-93 and accompanying text. O'Connor's test would suggest that opponents of the minority preferences would be allowed to "explain" the lack of minority licenses by the lack of minority applicants, rather than by any governmental discrimination. Second, the multicriteria choice process used to award broadcast licenses muddies the water a great deal. Any decision to refuse to grant a license to a minority can be explained by other criteria in the decision.

10. Previous works discussing the minority preference policies have failed to inquire about the actual relationship between ownership characteristics and programming. *E.g.*, Devins, *Metro Broadcasting, Inc. v. FCC: Requiem for a Heavyweight*, 69 TEX. L. REV. 125 (1990); Honig, *The FCC and Its Fluctuating Commitment to Minority Ownership of Broadcast Facilities*, 27 HOW. L.J. 859 (1984); Weissman, *The FCC and Minorities: An Evaluation of FCC Policies Designed to Encourage Programming Responsive to Minority Needs*, 16 COLUM. J.L. & SOC. PROBS. 561 (1981); Wimmer, *Deregulation and Market Failure in Minority Programming: The Socioeconomic Dimensions of Broadcast Reform*, 8 COMM./ENT. L.J. 329 (1986). One article critiques the tax-certificate policy on the ground that some or all of the benefits from a tax certificate may go to the (presumed) nonminority seller, rather than the minority purchaser. Wilde, *FCC Tax Certificates for Minority Ownership of Broadcast Facilities: A Critical Reexamination of Policy*, 138 U. PA. L. REV. 979, 1013 (1990). However, the main purpose of the tax-certificate program is to increase the number of broadcasting stations owned by minorities. This will happen *only* to the extent that some of the benefits from a tax certificate are retained by the seller. If a seller retains no benefit at all, it will have no special incentive to sell to a minority purchaser.

See also Hilliard, *Constitutional Conflict Over Race and Gender Preferences in Commercial Radio and Television Licensing*, 38 U. KAN. L. REV. 343 (1990) (contending that all FCC policies have failed to produce diversity and suggesting that 10% of all station licenses up for renewal be revoked and reallocated through a lottery); Comment, *The Constitutionality of the FCC's Use of Race and Sex in the Granting of Broadcast Licenses*, 83 NW. U.L. REV. 665 (1989) (authored by Timothy G. Gauger).

11. For the purposes of this Article, I presume that white males are profit maximizers.

Minority and female owners might give up some profits to satisfy a taste for specialized programming. Alternatively, minority and female owners might have a cost advantage at broadcasting programs targeted to their own groups. Next, I will review the data on the connection between ownership characteristics and programming choice. This data most likely supports the two possible reasons why minority and female owners program differently from white males, but the data cannot give any hint of how strong these differences might be, nor can the data completely rule out the possibility that there is no difference in programming choices between different types of owners. Last, I will review the majority and dissenting opinions in *Metro Broadcasting*, contrast the different treatments of the theory and evidence in the two opinions, and then briefly suggest an intermediate approach in which the insights from market-based models would play a much larger role in the justification of the minority preference policies.

II. THE MINORITY PREFERENCE POLICIES

Every broadcaster in the United States of America must have a license from the FCC.¹² A broadcast license for radio expires after seven years and for television after five years, at which time the broadcaster must renew the license to continue broadcasting.¹³ There are two basic methods of obtaining a broadcast license: direct grant from the FCC and purchase from an existing licensee.

The FCC employs two different procedures to grant licenses. First, the FCC holds comparative hearings to award radio and television licenses to applicants. When several applicants ask the FCC for the same license,¹⁴ the FCC compares several relevant characteristics of the applicants, combines the comparisons to form an overall evaluation of which broadcaster would best serve the "public interest," and then awards the

12. 47 U.S.C. § 301 (1988).

13. *Id.* § 307(c) (1988).

14. This can happen both at the first award of a license or at renewal time if one or more challengers contests the renewal. *Id.* § 309 (1988).

license to the best applicant.¹⁵ "Comparative criteria" include diversification of ownership of mass media, integration of ownership with management, and technical virtuosity.¹⁶ Second, the FCC grants certain types of licenses, particularly low-power television licenses, by lottery.

Sales of broadcasting licenses usually generate far less administrative process. Buyers and sellers are usually introduced through brokers,¹⁷ and the FCC is precluded by statute from considering any potential broadcaster other than the proposed buyer when approving the sale. As long as the new owner seems acceptable, the FCC must approve its license.¹⁸

The FCC enforces four minority preference policies. Two of them—the minority and female merit in comparative hearings and the lottery preference—apply to FCC license grants. The other two—the distress sale and the tax certificate—apply to license sales.

A. MINORITY AND FEMALE MERIT IN COMPARATIVE HEARINGS

The terms "enhancement"¹⁹ and "merit"²⁰ are used to describe any datum that suggests one of several applicants for a broadcasting license is preferable under a particular criterion used in the comparative hearing. Prompted by *TV 9 v. FCC*,²¹ the FCC awards a merit under the diversification-of-ownership criterion to an applicant if a substantial percentage of the applicant is owned by one or more minorities. In *TV 9* the FCC asserted that, because the Federal Communications Act was "color-blind," the FCC would take an applicant's race into account only to the extent that the applicant could show that its owner's race would likely lead to better, more diverse programming in the particular case. The D.C. Circuit reversed, essentially requiring the FCC to award a merit to

15. See *Central Fla. Enters. v. FCC*, 598 F.2d 37 (D.C. Cir. 1978), cert. dismissed, 441 U.S. 957 (1979); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971); Spitzer, *Radio Formats by Administrative Choice*, 47 U. CHI. L. REV. 647 (1980).

16. See Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393 (1965).

17. Pick up any copy of *Broadcasting Magazine* and leaf through the classified section at the back to view the numerous ads by brokers.

18. 47 U.S.C. § 310(d) (1988).

19. *West Mich. Broadcasting Co. v. FCC*, 735 F.2d 601 (D.C. Cir. 1984), cert. denied, 470 U.S. 1027 (1985).

20. See *Central Fla. Enters. v. FCC*, 598 F.2d 37 (D.C. Cir. 1978), cert. dismissed, 441 U.S. 957 (1979).

21. 495 F.2d 929 (D.C. Cir. 1973), cert. denied, 419 U.S. 986 (1974).

all minority applicants without any demonstration that the award would improve programming service.²²

The FCC not only complied with the *TV 9* ruling, but just four years later extended the case's application to women.²³ However, the FCC decided to extend "a merit of lesser significance"²⁴ in these cases because women, unlike racial minorities, have not been "excluded from the mainstream of society" due to prior discrimination.²⁵ Just as in *TV 9*, the FCC required no proof of connection between female ownership and diversity in program content.

B. TAX CERTIFICATES

In 1978 the FCC adopted two policies designed to stimulate the sale of broadcasting stations to minorities because "[f]ull minority participation in the ownership and management of broadcast facilities results in a more diverse selection of programming."²⁶ The first policy called for the FCC to issue special tax certificates to sellers when a station was sold to "parties with a significant minority interest."²⁷ A tax certificate allowed the seller to defer any capital gain tax on the sale. This policy gave the seller a substantial incentive to seek out qualified minority buyers and accept offers from minority buyers even where the minorities offered less money than prospective white purchasers.

The FCC has reported that it has issued 178 tax certificates since the inception of the program and that the program is being used with greater frequency.²⁸ The *Los Angeles Times* reports that Geraldo Rivera and four partners are spending hundreds of millions of dollars to assemble a new broadcast network utilizing tax certificates.²⁹

The same year that the FCC adopted the tax-certificate policy and the distress-sale policy for minorities, it refused to extend either policy to women. In a moderately surprising change of position, the FCC issued the following statement:

22. *Id.* at 938.

23. *Mid-Florida Television Corp.*, 69 F.C.C.2d 607, 652 (1978) (reviewing an application for a construction permit for a new television broadcast station).

24. *Id.*

25. *Id.*

26. Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 F.C.C.2d 979, 981 (1978) [hereinafter *Minority Ownership Policy*].

27. *Id.* at 983.

28. FCC Press Release (Mar. 9, 1989).

29. McDougal, *There's a New Geraldo . . . Sort Of*, L.A. Times, Mar. 5, 1989, Calendar, at 3.

[W]hile receptive to factual showings in specific cases which indicate a need for preferential incentives to encourage female involvement/ownership, we have not concluded that the historical and contemporary disadvantage suffered by women is of the same order, or has the same contemporary consequences, which would justify inclusion of a majority of the nation's population in a preferential category defined by the presence of "minority groups."³⁰

C. DISTRESS SALES

When the FCC announced the tax-certificate policy, it also announced the distress-sale policy. Under the distress-sale policy, the FCC would approve the transfer of any license designated for revocation hearing or for renewal hearing on basic qualification issues where minority buyers purchased the station before the start of the hearing and paid no more than seventy-five percent of fair market value.³¹ The minority purchaser could apparently take the license free of the taint that occasioned the hearing. This policy obviously gave licensees in danger of losing their licenses an incentive to seek out minority purchasers. Furthermore, the price ceiling of seventy-five percent of fair market value gave minority purchasers an incentive to seek out licensees in trouble. The FCC has reported that the distress-sale policy has been used fewer than forty times since its inception, far less often than the tax-certificate policy.³² As indicated previously, the FCC has refused to extend the distress-sale policy to female purchasers.

D. LOTTERY PREFERENCES

In 1981 Congress amended section 309(i) of the Federal Communications Act and granted discretion to the FCC to award broadcast licenses by lottery, directing the FCC to "establish rules and procedures to ensure that, in the administration of any system of random selection under this subsection, groups or organizations, or members of groups or organizations, which are underrepresented in the ownership of telecommunications facilities or properties will be granted significant preferences."³³ The Conference Report accompanying the bill included the following language:

30. National Telecommunications and Information Administration, 69 F.C.C.2d 1591, 1593 n.9 (1978) (petition for issuance of policy statement or notice of inquiry).

31. Minority Ownership Policy, *supra* note 26, at 983.

32. See FCC Press Release, *supra* note 28.

33. Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 1242, 95 Stat. 736, 736-37 (1981) (concerning television and radio broadcasting).

[I]t is the firm intention of the conferees that ownership by minorities, such as blacks and Hispanics, as well as by women, and ownership by other under-represented groups, such as labor unions and community organizations, is to be encouraged through the award of significant preferences in any such random selection proceeding. These are groups which are inadequately represented in terms of nationwide telecommunications ownership, and it is the intention of the conferees in establishing a random selection process that the objective of increasing the number of media outlets owned by such persons or groups be met.³⁴

The FCC claimed the lottery statute was too vague and refused to implement any such scheme. The FCC requested that Congress provide a new, more specific mandate. In 1982 Congress responded by passing new subsection 309(i)(3)(C)(ii), which provided that "[t]he term 'minority group' includes blacks, Hispanics, American Indians, Alaska Natives, Asians, and Pacific Islanders."³⁵ In addition, Congress amended 309(i)(3)(A) to direct that

significant preferences will be granted to applicants or groups of applicants, the grant to which of the license or permit would increase the diversification of ownership of the media of mass communications. To further diversify the ownership of the media of mass communications, an additional significant preference shall be granted to any applicant controlled by a member or members of a minority group.³⁶

The FCC granted lottery preferences to the listed groups, plus those owning no or very few other media interests.³⁷ After a quite divisive

34. H.R. Rep. No. 208, 97th Cong., 1st Sess. 897 (1981).

35. 47 U.S.C. § 309(i)(3)(C)(ii) (1988).

36. 47 U.S.C.A. § 309(i)(3)(A) (West Supp. 1990). The conferece report muddled the waters a bit:

[I]t should be noted that such groups as women, labor unions, and community organizations which are mentioned in the legislative history of the lottery statute that was originally adopted . . . are all significantly underrepresented in the ownership of telecommunications facilities. Such applicant groups would, of course, be eligible for both media ownership and minority preferences if they meet the eligibility guidelines. The Conferees expect that such groups will also substantially benefit from this lottery preferences scheme.

Communications Amendments Act of 1982, Pub. L. No. 97-259, § 115 (1982).

37. Amendment of the Commission's Rules to Allow the Selection from Among Certain Competing Applications Using Random Selection or Lotteries Instead of Comparative Hearings, 93 F.C.C.2d 952 (1983) (second report and order).

rule-making proceeding,³⁸ the FCC decided not to give lottery preferences to women.³⁹

E. COURT CHALLENGES AND SUBSEQUENT HISTORY

1. West Michigan Broadcasting Co. v. FCC

In 1984 the D.C. Circuit affirmed the legality of the minority preference in comparative hearings in *West Michigan Broadcasting Co. v. FCC*.⁴⁰ Two applicants, West Michigan Broadcasting and Waters, clashed over the award of an FM radio station in Hart, Michigan, a community with no significant black population. Waters, wholly owned by a black woman, was granted the license, partly because of an enhancement for the owner's race. West Michigan appealed and claimed that the enhancement was illegal under the Federal Communications Act and the due process clause of the fifth amendment to the Constitution. Judge Skelly Wright, writing for a unanimous court, turned aside both challenges. The court held that the enhancement in a comparative hearing was lawful because the FCC was guided by the "public interest" standard embedded within the Federal Communications Act of 1934. Part of the public interest included ensuring a diverse set of program offerings to the public. The court stated that the *TV 9* decision from ten years before should be interpreted to require the FCC to assume that black owners would present distinctive programming.⁴¹ Such programming was valuable not only to satisfy the preferences of black audiences, but also to expose others to new points of view and ideas.⁴²

38. Amendment of the Commission's Rules to Allow the Selection from Among Certain Competing Applications Using Random Selection or Lotteries Instead of Comparative Hearings, 95 F.C.C.2d 432 (1983) (third notice of proposed rule making). The FCC asked if women could be included in the lottery preference, either as a minority group or as a group owning few media interests. In response, the American Association of University Women, the American Women in Radio and Television, the National Organization for Women Legal Defense Fund, and others said yes. American Christian Television Systems, Citizens Communications Center (a Georgetown University-related public interest group), Black Citizens for a Fair Media, the National Conference of Black Lawyers, and United Church of Christ all said no.

39. *In re* Amendment of the Commission's Rules to Allow the Selection from Among Certain Competing Applications Using Random Selection or Lotteries Instead of Comparative Hearings, 58 RR 2d 1077 (1985) (The FCC read the new section 309 as precluding women from being included as minorities for purpose of the lottery and hence decided to give no preferences in lottery to women.); accord *Pappas v. FCC*, 807 F.2d 1019 (D.C. Cir. 1986).

40. *West Mich. Broadcasting Co. v. FCC*, 735 F.2d 601 (D.C. Cir. 1984), cert. denied, 470 U.S. 1027 (1985).

41. Particularly in news and public affairs. *Id.* at 610.

42. *Id.* at 610-11. The constitutional attack was turned away largely on the strength of two Supreme Court decisions, *Fullilove v. Klutznick*, 448 U.S. 448 (1980), and *University of California Regents v. Bakke*, 438 U.S. 265 (1978).

2. *Steele v. FCC and the Aftermath*

In 1985 the D.C. Circuit held unlawful the female preference in comparative hearings in *Steele v. FCC*.⁴³ The *Steele* opinion stated that minority and female preferences rested on two assumptions: (1) that minority and female owners have different tastes and preferences than do white males and (2) that these tastes and preferences are manifested in the programming choices of minority and female owners.⁴⁴ The opinion regarded the first assumption as stereotyping and the second as empirically unlikely because programming decisions were more likely profit driven than preference driven.⁴⁵ The D.C. Circuit accepted these assumptions in the case of minority preferences, but it was not willing to do so for female preferences.

After the D.C. Circuit granted rehearing en banc in *Steele*, the FCC changed its position and indicated that it no longer supported the minority and female preferences.⁴⁶ The D.C. Circuit then remanded *Steele*, along with two other cases, to allow the FCC to reconsider and further investigate the factual predicates for the minority and female preferences in comparative hearings. The FCC put out a Notice that it was rethinking the entire area⁴⁷ and also mailed detailed questionnaires to licensees, requesting answers to questions on the relationship between ownership characteristics and programming content.

The FCC received responses from approximately seventy-nine percent of those questioned, but before the FCC could evaluate the responses, Congress passed House Joint Resolution 395, which terminated the inquiry and directed the FCC to use the preferences.⁴⁸ The FCC therefore terminated its inquiry, reinstated the licensing decisions in

43. 770 F.2d 1192 (D.C. Cir. 1985).

44. *Id.* at 1198.

45. *Id.* at 1199.

46. See Leiby, *The Female Merit Policy in Steele v. FCC: "A Whim Leading to a Better World?"*, 37 AM. U.L. REV. 379, 380 n.4 (1988).

47. See *In re* Reexamination of the Commission's Comparative Licensing, Distress Sales and Tax Certificate Policies Premised on Racial, Ethnic or Gender Classifications, 1 FCC Rcd 1315 (1986); Reexamination of the Commission's Comparative Licensing, Distress Sales and Tax Certificate Policies Premised on Racial, Ethnic or Gender Classifications, 52 Fed. Reg. 596 (FCC 1987) (notice of inquiry).

48. H.R.J. Res. 395, 100th Cong., 2d Sess., 102 Stat. 2216 (1987), contains the following rider:

[N]one of the funds appropriated by this Act shall be used to repeal, to retroactively apply changes in, or to continue a reexamination of, the policies of the Federal Communications Commission with respect to comparative licensing, distress sales and tax certificates . . . to expand minority and women ownership of broadcasting licenses.

the remanded cases in favor of the minority and female licensees,⁴⁹ and delivered the returned questionnaires to the Congressional Research Service for analysis. The Congressional Research Service has since issued a report that claims to find some support for the connection between ownership characteristics and programming choices. Two of the cases that were remanded to the FCC during the *Steele* proceedings found their way back to the D.C. Circuit. The court issued decisions in March 1989, finding the distress-sale policy unconstitutional and the minority preferences in comparative hearings constitutional. Each decision contains heated disagreements between the impaneled judges, and one of the main points of contention is the relationship between minority and female ownership and programming choices.⁵⁰ The Supreme Court has reviewed both cases in *Metro Broadcasting*⁵¹ and upheld the constitutionality of the minority preference policies, basing its decision on the relationship between ownership characteristics and programming choices.

III. A SOCIAL SCIENCE APPROACH TO DETECTING THE RELATIONSHIP BETWEEN OWNERS' CHARACTERISTICS AND PROGRAMMING CHOICES

This part will propose a theory of programming choices by profit-maximizing owners in broadcasting markets. The theory will then be modified to take into account the race or sex of a broadcast station owner. I will then evaluate the few studies that address the connection between owners' characteristics and programming choices against the theoretical background developed.

A. BASIC THEORY OF PROGRAM CHOICE BY RATIONAL PROFIT MAXIMIZERS

This section will investigate the basic theory of program choice by profit-maximizing owners, paying special attention to how and under what circumstances such owners will choose to present minority-interest programming rather than mass-appeal fare. The theoretical literature

49. See *Applications of Metro Broadcasting, Rainbow Broadcasting Company, and Winter Park Communications*, 3 FCC Rcd 866 (1988).

50. *Shurberg Broadcasting v. FCC*, 876 F.2d 902 (D.C. Cir. 1989), *rev'd sub nom.*, *Metro Broadcasting v. FCC*, 110 S. Ct. 2997 (1990); *Winter Park Communications v. FCC*, 873 F.2d 347 (D.C. Cir. 1989); *aff'd sub nom.*, *Metro Broadcasting v. FCC*, 110 S. Ct. 2997 (1990).

51. 110 S. Ct. 2997 (1990).

has two parallel lines of analysis regarding the question of broadcast programming. One set of articles, stemming from Steiner's paper *Program Patterns and Preferences and the Workability of Competition in Radio Broadcasting*,⁵² models radio broadcasting as a game among broadcasters who are interested in gaining large audiences.⁵³ A second set of articles, stemming from a paper by Spence and Owen,⁵⁴ uses modern monopolistic-competition theory to analyze the problem.⁵⁵

1. *Steiner Models*

a. *Steiner's original article:* Steiner wrote his article in an effort to map the relationship between (monopolistic or competitive) market structures in broadcasting and the "nature and quality of particular programs" produced by the industry.⁵⁶ Steiner took as given the "three cornered" nature of the broadcasting industry: Broadcasters lure audiences with programs and sell the audiences to advertisers, who in turn show advertisements to the audiences. Audiences do not pay directly for the broadcast programs. Given this framework, Steiner asked his readers to make the following assumptions. First, once a program has been broadcast, there is no additional cost of adding another viewer.⁵⁷ (In this sense, broadcasting is a public good.) There is one time period in which a broadcaster must decide what to program. The broadcaster can select one from a series of program "types" and will make the choice so as to maximize the number of viewers for the station. Each viewer wishes to watch one type of programming and will watch if that type is aired. Otherwise, the viewer will not watch.

TABLE 1
PROGRAM TYPES

	L ₁	L ₂	L ₃	L ₄
Number of Viewers	210	75	50	31

52. Steiner, *Program Patterns and Preferences and the Workability of Competition in Radio Broadcasting*, 66 Q.J. ECON. 194 (1952).

53. A substantial amount of time will be spent examining this theory because it is crucial to subsequent discussion. Actually, Steiner's work derives from Hotelling, *Stability in Competition*, 39 ECON. J. 41 (1929). For an excellent review of this literature, see B. EATON & R. LIPSEY, *Product Differentiation*, in 1 HANDBOOK OF INDUSTRIAL ORGANIZATION 723 (1989).

54. Spence & Owen, *Television Programming, Monopolistic Competition, and Welfare*, 91 Q.J. ECON. 103 (1977).

55. Less time is spent on these models because, for our purposes, they add little to the insights from the Steiner models.

56. Steiner, *supra* note 52, at 195.

57. I will refer to both listeners and viewers as "viewers."

The essence of Steiner's insight can be captured by the numerical example in table 1. Assume that there are only four types of programs— L_1 , L_2 , L_3 , L_4 —and that there are 210 consumers who prefer L_1 , 75 who prefer L_2 , 50 who prefer L_3 , and 31 who prefer L_4 . Given the model's assumptions, consider the program mix that will be produced by one, two, three, or four competitive broadcasters.

TABLE 2
PROGRAMS OFFERED BY COMPETITORS

	1	L_1	-	-	-
Number of	2	L_1	L_1	-	-
Channels	3	L_1	L_1	L_2	-
	4	L_1	L_1	L_1	L_2

As shown in table 2, if there is only one broadcaster, that broadcaster will air L_1 and garner all 210 viewers of that type. A second competitive broadcaster will also air L_1 because the second broadcaster can get 105 viewers (one-half of 210), which is better than the 75 viewers that one could get from airing L_2 . A third competitor will air L_2 because a third channel of L_1 would get only 70 viewers, whereas L_2 gets 75. But a fourth competitor would choose to show L_1 because 70 viewers is more than it could get with any other choice.

TABLE 3
PROGRAMS OFFERED BY A MONOPOLIST

	1	L_1	-	-	-
Number of	2	L_1	L_2	-	-
Channels	3	L_1	L_2	L_3	-
	4	L_1	L_2	L_3	L_4

In contrast, as shown in table 3, a monopolist that controlled all channels would never choose to duplicate any programs. As long as the advertising revenues from the least popular type of show (L_4) were sufficient to cover costs of production and exhibition, the monopolist would utilize all available channels and show a diverse mix. The three types of minority-interest programming, L_2 , L_3 , and L_4 , would gain much more exposure in a monopolistic market than in a competitive market.

Steiner's article is crucial for two reasons. First, his method of formalizing models of broadcasting markets changed the way subsequent scholars have looked at the industry. Second, his rather startling conclusion that a monopolist can be expected to cater to minority tastes more

than competitors both explained many viewers' sense of the overwhelming "sameness" of offerings on the network triopoly and challenged our traditional reverence for competition.

b. *Beebe's article*: Steiner's insights were independently rediscovered and slightly extended by Rothenberg in 1962⁵⁸ and then extended further by Wiles in 1963.⁵⁹ But the biggest advance on these models was produced by Beebe in 1977.⁶⁰

i. *Assumptions*: Although many of Beebe's basic assumptions mirror those of Steiner, the assumptions about audience preferences and behavior differ substantially. In particular, Beebe varies the degree to which the distribution of preferences is skewed across program types and also varies the extent to which audiences are willing to watch mass-appeal programming if their favorite types are not available. Beebe's model began with five program types and five groups of television viewers. Beebe made nine alternative assumptions about market demand, derived by considering three alternatives about the number of viewers in each of the groups together with three alternatives about program preferences within the groups.

TABLE 4
GROUP SIZE UNDER ALTERNATIVE DISTRIBUTIONS

	A. Highly Skewed Distribution	B. Moderately Skewed Distribution	C. Nearly Rectangular Distribution
g 1	8,000	5,000	1,077
r 2	1,600	2,500	970
o 3	320	1,250	872
u 4	64	625	785
p 5	12	313	707

58. Rothenberg, *Consumer Sovereignty and the Economics of TV Programming*, 4 STUD. PUB. COMM. 45 (1962).

59. Wiles, *Pilkington and the Theory of Value*, 73 ECON. J. 183 (1963).

60. Beebe, *Institutional Structure and Program Choices in Television Markets*, 91 Q.J. ECON. 15 (1977).

ORDINAL RANKING OF PROGRAM TYPES BY VIEWER GROUPS

	1. Viewers watch only first choice					2. Viewers have unique lesser choice					3. Viewers have a common lesser choice (common denominator)				
	Viewer group number					Viewer group number					Viewer group number				
	1	2	3	4	5	1	2	3	4	5	1	2	3	4	5
Programs	1	1				1	2				1	2	3	3	3
	2		1				1	2				1	2		
	3			1				1	2				1	2	
	4				1				1	2				1	2
	5					1				1					1

Table 4 fills in the details of Beebe's assumptions. His first assumption about viewer preferences (that "viewers watch only first choice") corresponds to Steiner's model. Beebe's second assumption allows each viewer to have a second choice. For example, viewers in group 5 prefer to view program type 5, but if no type 5 program is on, they will be willing to view type 4. If neither program type 5 nor type 4 is available, viewers in group 5 will not watch. Viewers in group 1 are willing to watch only type 1 programs. With Beebe's third assumption—that there is a common denominator—all viewers will be willing to watch type 1 programs. For viewers in group 1 this is the only type of program they will be willing to watch. For members of all other groups, however, type 1 programming represents an acceptable second or third choice.

Beebe's three alternative assumptions about the sizes of the viewer groups, also listed in table 4, complete his assumptions about viewer demand.

Beebe provides eight alternative characteristics of program supply. First, he varies program costs, assuming that they are either high (requiring an audience of at least 1,200 viewers to break even) or low (requiring an audience of only 800 viewers to cover costs). Second, Beebe allows channel capacity to be limited (three channels) or unlimited. Third, he allows the broadcasting channels to be controlled either by a monopolist or by a set of competitors. By considering (1) high and low costs together with (2) limited and unlimited channel capacity and (3) monopolistic and competitive control of broadcast channels, Beebe provides eight characterizations of program supply.

The nine alternatives for market demand and eight alternative characterizations of program supply create seventy-two different economies to analyze. For each of these economies, Beebe calculates the

equilibrium program output with a computer program.⁶¹ Then, by changing only one of the variables and observing the programming-output changes that result, Beebe observes the effect of that particular variable.

In Beebe's model a monopolist provides whatever will maximize profits, given the other parameters of the economy, and does so by wooing the largest total audience for the broadcasting system. Whatever programming a monopolist provides is, by definition, the programming output of the industry.

Calculating the programming output of a competitive industry is a bit more complex. A competitor, like a monopolist, wishes to maximize profits but does so by maximizing the size of the audience on the competitor's own channels, given what other competitors offer. To predict the simultaneous output of several competitors, Beebe postulates that equilibrium exists where no competitor has an incentive to alter program offerings so long as no one else changes programming.⁶² Competitive broadcasters will reach an equilibrium and, having done so, will remain there. The programming output of the broadcasting industry can then be calculated.

ii. *Results:* We will not review all of Beebe's results, for they are not all of central importance to this Article's purposes. We will discuss several of them, however, to understand how the broadcasting industry produces minority-interest programming in Beebe's model.

61. *Id.* at 21.

62. *Id.* at 22.

TABLE 5

Case Number	Pref. Pattern	Viewer Distrib.	No. of Channels	Monopoly	Programs Offered by Competition
1	1	A	3	1,2	1,1,1
2	1	A	6	1,2	1,1,1,1,1,2
3	1	C	3	1,2,3	1,2,3
4	2	B	3	1,3	1,1,2
					1-4, each with 75%
5	2	C	3	1,3,5	probability*
6	3	C	5	1	1,2,3,4,5**

* Here the solution is a *cycle* of program offerings (similar to the child's game of scissors, rock, and paper), rather than a stable, pure strategy equilibrium.

** This case was not included in Beebe's chart.

Table 5 contains the results of five cases in Beebe's paper.⁶³ Case 1 corresponds to Steiner's original result. If viewers watch nothing other than their first choices and if the preference groups are highly skewed, as opposed to distributed evenly, a monopolist will produce some minority-interest programming, while competitors will tend to duplicate whatever the largest group likes best. However, as we begin to diverge from the two assumptions about market demand inherent in the Steiner paper, Steiner's results begin to fail. Case 3 uses the same preference pattern as Case 1 but assumes that the viewer groups are almost equally sized. In this case the monopolist will program the maximally diverse offering, but so will competitors. (Note that as long as each of the three competitors believes that the others will continue to offer the equilibrium programming, none will change its own offering.) Case 6 shows that competitive programming can be much more diverse than monopolistic programming. If viewers are all willing to watch common-denominator programming and if viewer groups are of almost equal size, a monopolist will provide nothing but common-denominator programming,⁶⁴ while competitors will offer a completely diverse lineup.

These examples show that there is an interaction between the variables of monopolistic versus competitive control of broadcasting channels and the distribution of viewer tastes. Monopolists produce more minority-interest programming if viewers are unwilling to watch anything but their first choices and if their first choices are highly skewed

63. *Id.* at 24 (table II).

64. This result was first noted by Wiles, *supra* note 59, at 187.

toward one type of programming. But competitors produce much more minority-interest programming if viewers are willing to watch common-denominator programming and their first choices are fairly evenly distributed.

Beebe calculates the programming output for all seventy-two alternative economies and finds several tendencies. First, the interaction between competitive versus monopolistic control of the broadcasting industry and the distribution of viewer tastes and preferences described above persist as long as the number of channels is quite limited. Monopolists will produce common-denominator programming if viewers will watch it, and competitors will duplicate the first preferences of large groups (rather than produce minority-interest programming) if the distribution of viewer preferences is skewed. However, if the number of channels is quite large, competitors will produce at least as much minority-interest programming as the monopolist.

Second, consumers are never made worse off by the addition of channel capacity.⁶⁵ In particular, the amount of minority-interest programming never contracts in response to an expansion of channel capacity, and sometimes it increases.

Third, program costs, which Beebe includes in his model as a minimum audience size needed for a program to break even, can drastically change the analysis. If costs are high relative to the potential audience for a program, neither a monopolist nor competitors will produce the program. Both would rather leave channels vacant than produce the minority-interest programming. In such cases, the observed duplication of the first choices of large groups (by competitors) or common-denominator programming (by a monopolist) should not be taken as evidence that viable but less profitable minority-interest programming is being ignored.

iii. *Missing links?*: Are any of Beebe's results dependent on crucial, unrealistic assumptions? One crucial assumption, explored within the context of monopolistic competition models, is that viewers do not pay directly for programming. The arrival of pay-per-view will make such an assumption faulty. In addition, different audiences have different demographic appeal, and this is not directly addressed in the Steiner model. However, since a viewer with more demographic appeal (or "disposable income") can be "counted" as more than one viewer, the model works fine. Third, Beebe's results assume that advertising prices would

65. Beebe, *supra* note 60, at 30.

be the same in both a monopolistic and a competitive environment. However, a monopolist would likely restrict available advertising minutes so as to raise their price and the monopolist's profits.⁶⁶ This might provide a direct benefit to some viewers, but how would it affect minority-interest programming? Depending on the elasticities of demand for minority-interest programming and common-denominator programming, a monopolist might find minority-interest programming more profitable, less profitable, or unchanged when compared with common-denominator programming under a competitive pricing system. In general, nothing can be said about this effect.

2. *Monopolistic Competition*

In 1977 Spence and Owen introduced a monopolistic competition model of broadcasting to evaluate the welfare consequences of a monopoly versus competition within a context of either advertiser-supported or direct viewer-paid programming.⁶⁷ Spence and Owen use a traditional economic measure of welfare—the total of producer and consumer surplus⁶⁸—to evaluate the output of the broadcasting market. Although a welfare analysis of the broadcasting market can be quite interesting in its own right, for our purposes the positive description of the industry's output is more important. For this reason we will first outline the basics of a monopolistic competition model and then, given alternative assumptions, summarize its predictions about the final program mix in the industry.

In its most general form Spence and Owen's monopolistic competition model posits that no firm's programming output can be duplicated *exactly* by a competitor. However, competitors can broadcast programming that consumers regard as imperfect substitutes. This shapes

66. This depends on the elasticity of demand for advertising time. The marginal cost of *producing* ad time is virtually zero.

67. Spence & Owen, *supra* note 54.

The economic literature on product differentiation can be divided into two branches. See B. EATON & R. LIPSEY, *supra* note 53. In the "address" branch, researchers assume that consumers have ideal points within a space of characteristics of a product. Products are identified by their location in the space of characteristics. For an example of empirical work on television shows that attempts to locate them within a 48-dimensional characteristic space, see Bowman, *Consumer Choice and Television*, 7 APPLIED ECON. 175 (1975). In the "nonaddress" branch, the researcher assumes a finite number of goods and characterizes them by the degree to which the goods are regarded as substitutes for one another. To get results, researchers frequently employ a symmetry assumption, according to which all goods are equally good substitutes for one another. Spence and Owen work in the "nonaddress" tradition.

68. Although this measure is traditional in economic studies of markets, it is not without a great deal of controversy in philosophy and law. See *Efficiency as a Legal Concern*, 8 HOFSTRA L. REV. 485 (1980).

demand for each firm's output. The better the substitutes for a station's programming, the less market power the station has. Therefore, each firm must decide what programming to produce, given the decisions of the other stations.⁶⁹ The decisions are shaped by whether viewers pay directly for programming, as well as whether the industry is controlled by a single monopolist or has a place for many monopolistic competitors.

After a great deal of mathematical grinding,⁷⁰ Spence and Owen uncover some biases in the broadcasting system. First, they consider viewer-paid programming in a market of monopolistic competition. If minority-taste programs have steep inverse demand functions—that is, they are very highly desired by a small number of people and desired by a greater number only at very low prices (if at all)—then there will be a “bias” against producing minority-interest programming. However, we must be careful to note that in this context Spence and Owen have a special meaning for the word “bias.” They mean that majority-interest programs that produce little consumer surplus may be more profitable than minority-interest programs that produce a great deal of consumer surplus. Thus, *from the standpoint of welfare economics*, a monopolistically competitive industry may produce too few minority-interest programs. Spence and Owen describe only a tendency in the industry. They do not compute exact industry output; nor do they suggest that there will be no minority-interest programming. Spence and Owen then ask if advertiser-supported television would suffer from the same sort of bias, and they conclude that the bias against minority-interest programming would be even worse than it was under pay-TV.

Second, Spence and Owen find that there will be a bias against costly programs, again measured by the consumer and producer surplus norm.⁷¹ Finally, they find that a monopolist, not surprisingly, will restrict the number of shows so as to raise prices and reduce overall welfare.⁷²

69. In the Spence and Owen model, each firm chooses output under the assumption that other firms' decisions will not react to its own choice.

70. The mathematics and exposition are rendered much clearer by R. Lence, *Theories of Television Program Selection: A Discussion of the Spence-Owen Model* (Studies in Industry Economics, Department of Economics, Stanford University Discussion Paper No. 94, 1978).

71. See *id.* at 30.

72. Spence & Owen, *supra* note 54, at 110. Much of the rest of their analysis consists of characterizing industry equilibriums if all programs are equally good substitutes and then ranking the welfare properties of these equilibriums. Because very little light is shed upon the question of minority programming and because of the somewhat controversial notion of total surplus as applied to minority programming, we will not review the remainder of Spence and Owen's work in the text of this Article.

The Spence and Owen analysis has been extended and modified in only a few papers. Most of the results are aimed at a welfare analysis of various market structures, however, rather than at the question of minority programming.⁷³ To the extent that the newer literature does address questions of minority-interest programming, it tends to reach the same conclusions proposed by the Steiner and Spence-Owen models.⁷⁴

3. Public Choice Models

a. *Noam's model*: Eli Noam has published a model that uses techniques first developed in the literature on public choice, particularly regarding voting behavior and candidates' platform choices.⁷⁵ Noam assumes that every program can be located on a one-dimensional scale running from "low culture" to "high culture." (Although Noam does not say so, I would guess that public broadcasting's *Masterpiece Theatre* is high culture, while the Disney Channel's *Mouseterpiece Theater* is low culture.) Each type of programming has a "pitch"—Noam's term for the program's point on the culture dimension. Each viewer has a most preferred pitch. If the viewer's favorite type of program is shown, the viewer will watch. If the viewer's preferred type of program is not shown, the viewer may or may not watch. The further the distance from the viewer's most preferred pitch to the closest substitute shown, the less likely the viewer is to watch.

73. See Wildman & Owen, *Program Competition, Diversity, and Multichannel Bundling in the New Video Industry*, in VIDEO MEDIA COMPETITION: REGULATION, ECONOMICS, AND TECHNOLOGY 244 (E. Noam ed. 1985), in which the authors analyze a video market in which each monopolistic competitor can choose between advertiser support or direct viewer payments. If each viewer is restricted to purchasing at most one channel, Wildman and Owen's results track those of Spence and Owen. If viewers are allowed to purchase more than one service, however, the theoretical models become intractable. *Id.* at 253-55.

Wildman and Owen also explore multichannel bundling, such as is done with "tiering" on most cable television systems, and demonstrate that, depending on demand and cost parameters, bundling may either enhance or inhibit economic efficiency. *Id.* at 255-58.

74. For example, Waterman analyzes the programming choices of a monopolist cable-television operator who has control over production budgets and who faces either advertiser or pay support within a context of limited or unlimited channel capacity. Waterman, "Narrowcasting" on Cable Television: A Program Choice Model, Annenberg School of Communications, University of Southern California (Oct. 12, 1988). Waterman finds that, as the number of channels increases, the audience fragments, and minority-interest programming finds its way onto the cable system. Borenstein finds that a system with a limited number of broadcast licenses will have a bias against minority-interest programming. Borenstein, *On the Efficiency of Competitive Markets for Operating Licenses*, 103 Q.J. ECON. 357 (1988). Borenstein shows that an auction mechanism will not necessarily allocate licenses—including broadcasting licenses—to the most welfare-enhancing use. The "lumpiness" of licenses causes bidders to consider the profit on inframarginal units, thereby leading to economically inefficient choice of broadcast format. The bias will be against minority-interest programming and for mass-appeal programming. *Id.*

75. Noam, *A Public and Private-Choice Model of Broadcasting*, 55 PUB. CHOICE 163 (1987).

Noam assumes that viewer tastes are distributed normally.⁷⁶ He then analyzes the programming choices of broadcasters under conditions of monopoly and competition, single and numerous channels, and private and public control.

Noam first shows that, if there is only one broadcast channel with a private, profit-maximizing monopolist in control and if all portions of the audience are equally valued by the advertisers, the monopolist will program so as to maximize its audience—achieved by choosing the pitch equal to the midpoint of the normal distribution. If viewers who prefer high culture programs have more income and are therefore more desired by advertisers, the monopolist will slide its program choice toward high culture.

Noam then shows that if the government controls the broadcasting station, it will program so as to achieve its own goals. If the nature of programming were an election issue, rival parties would promise programming so as to woo voters. Assuming that the distribution of voters and viewers is identical, a two-party system would converge upon centrist programming.⁷⁷ Noam also investigates the use of a government broadcasting monopoly for spoils purposes and for propaganda, but Noam's most important analysis for our purposes involves multichannel television.

Noam's conclusions are generally consistent with those of the Beebe and Spence-Owen models. Most crucial is that numerous competitors will have an incentive to serve minority tastes: "As the number of stations increases, their spread across the distribution widens, i.e., more 'outlying' program tastes are reached. At the same time, i.e., the spacing between the chosen program pitches decreases, and viewers find closer substitutes for their favored program pitches."⁷⁸ However, Noam also concludes that a duopoly will not converge to common programming but rather will differentiate programs. This is a direct result of Noam's assumptions about viewer preferences—that as the distance from a favorite program pitch to the closest offered program grows, the probability of viewing declines—and about the shape of the distribution of viewer tastes. Noam's analysis includes some of the same logic as Beebe's first preference pattern, where viewers are willing to watch only their first

76. Noam claims "the use of a distribution other than the normal would alter not so much the basic analysis as the computations." *Id.* at 165. But, as Garber shows, changing the distribution would change Noam's results. Garber, *The Economics and Political Economy of Broadcasting: Challenges in Developing an Analytic Foundation*, 55 PUB. CHOICE 189 (1987).

77. Noam, *supra* note 75, at 169.

78. *Id.* at 175.

choice and have a nearly rectangular preference distribution. With these preferences, Beebe found that competitors differentiated themselves. Noam also finds that many competing stations are required before those whose tastes lie at the extremes will be served. (The success of the *Gong Show* may prove that those at the low culture end of the spectrum have a chance at being served by commercial broadcasters.) Noam says that this provides a rationale for having a government-controlled channel produce some minority-interest programming. If the government does produce minority-interest programming, however, commercial broadcasters will have much less incentive to produce such minority-interest broadcasting material on their own.⁷⁹

b. *Cox's models of candidate platform competition:* Gary Cox has analyzed the strategies of politicians who attempt to maximize their share of the vote through choices of positions on a one-dimensional (liberal-conservative) scale.⁸⁰ Cox has shown that if voters have ideal positions on the issue dimension and will vote for candidates whose positions are closer to rather than further from their own, then as long as there are at least three candidates, not all candidates will take the same position on the issues.⁸¹ In addition, if there are m candidates, at least one of the candidates will choose a position such that at least $(m-1/m)$ of the voters are to the left, and another candidate will choose a position such that at least $(m-1/m)$ of the voters are to the right.⁸² In other words, not all candidates will be centrist, and the more candidates there are in the race, the more extreme some of them will be.⁸³

79. Garber provides a compelling criticism of Noam's approach and techniques. Garber, *supra* note 76. Whether or not Garber is right (and I believe that he is), for our purposes the important point is that Noam's conclusions seem consistent with those of Beebe and Spence-Owen.

80. G. Cox, *Centripetal and Centrifugal Incentives in Electoral Systems* (Department of Political Science, University of California, San Diego, Working Paper, 1989). See also Cox, *Electoral Equilibrium Under Alternative Voting Institutions*, 31 AM. J. POL. SCI. 82, 89 (1987).

81. See G. Cox, *supra* note 80, at 21-23 (theorem 4).

82. If, that is, a Nash equilibrium exists.

83. Cox's results described in the text apply to the case where each voter has only one vote and the competitors are political parties under a proportional representation system. Two points should be made about the applicability of this model to the broadcast market. First, as Gary Cox pointed out to me in conversation, viewers may divide up their viewing day among several stations and hence could be thought to have more than one vote—perhaps one vote per half hour—but may abstain from voting (turn off the set) or accumulate their votes (by watching the same station during several periods). If this is a more appropriate characterization of the broadcasting market, Cox's results are modified in the following way. Assume each voter has v votes. Then as long as there are more than $2v$ competing political parties, any equilibrium will be dispersed in the sense that the party furthest left must be positioned at or to the left of the ideal position of the (v/m) th most conservative voter,

Cox's results also have meaning for the broadcasting market. If broadcast programming can be characterized as having a position on a one-dimensional space (as in Noam's work) and if viewers will watch the programming closest to their ideal program, then Cox's model describes the behavior of audience-maximizing broadcasters. As long as there are three broadcasters in a market, they will not all broadcast the same types of programming. Furthermore, if there are m broadcasters, at least one of them will program such that at least $(m-1/m)$ of the viewers are to the left, and another will program such that at least $(m-1/m)$ of the viewers are to the right. The more broadcasters there are, the more "extreme" some of them will be. Put differently, adding more broadcasters to a market will increase service to the "minority" audiences, those with preferences at the endpoints of the dimension.

4. *Pulling the Theories Together*

In general, the theoretical works discussed above agree on the circumstances under which profit-maximizing broadcasters will provide minority-interest programming. If viewers are unwilling to watch anything but first choices, their first choices are highly skewed, and the number of channels is quite limited, then a monopolist will produce more minority-interest programming than will competitors. On the other hand, if viewers are willing to watch mass-appeal programming and if first choices are almost evenly distributed, competitors will provide much more minority-interest programming. This result holds regardless of whether the number of channels are limited or not. If the number of channels is extremely large, competitors will tend to provide at least as much minority-interest programming as a monopolist would. Intermediate cases produce intermediate results.

Later in this Article, I will ask how, if at all, the race, ethnic origin, or sex of a broadcast station owner might be expected to alter the basic theory of producing minority-interest programming. But before I do that, I will review some empirical work that seeks to test the basic theory of program selection. After all, if the basic theory were to fail to predict

and the party furthest right must be positioned at or to the right of the ideal position of the $(m-v/m)$ th most conservative voter. G. Cox, *supra* note 80, at 21-23.

Second, in a proportional representation system, a competing party must garner at least some threshold percentage of the votes to gain representation in the legislature. For example, in a legislature with 50 seats, a party would need at least 2% of the vote. In broadcasting, however, a station with only 1% of the listening public gets to "keep" its audience. Cox notes that "it can be shown that formulas with lower thresholds of exclusion will promote greater dispersion (at least in models allowing . . . global spatial mobility)." *Id.* at 22.

basic observations, there would be much less warrant for relying upon that theory in later discussions.

B. DATA TESTING THE BASIC THEORY

Rogers and Woodbury⁸⁴ provided a statistical test to evaluate whether an increase in the number of radio stations in a market produced an increase in the number of formats. Rogers and Woodbury used the number of formats as the dependent variable⁸⁵ and used market population, median household income, and some other demographic characteristics as the independent variables. To get some measure of the dispersion of tastes in the population—a variable Beebe's analysis suggests is crucial—Rogers and Woodbury used percentage of the market population over age thirty-four, percentage of blacks, and percentage of Hispanics. The results tended to confirm the basic theory of programming choice. The coefficients of the number of stations in the market and the coefficients of the measures of black and Hispanic populations were all positive and significant. Only the percentage of the population over thirty-four, which would seem less connected to taste dispersion than the black and Hispanic variables, and the income measure, which would seem poorly tied into the basic theory in the first place, were insignificant.

Waterman and Grant⁸⁶ assembled data from a sample of sixteen full days of programming on forty nationally distributed cable and broadcast networks between January 1 and June 30, 1986. Waterman and Grant included twenty-six basic cable networks,⁸⁷ eleven premium channels,⁸⁸ and three broadcast networks.⁸⁹ They coded all programming by subject

84. R. Rogers & J. Woodbury, *The Conflict Between Spectrum Efficiency and Economic Efficiency: Diversity Considerations in the Flexible Use of Spectrum Allocated to Radio* (Federal Trade Commission Working Paper, 1988).

85. Formats were easy listening, rock, big band, black, classical, ethnic (mostly Hispanic), religious, classical, news/talk, jazz, country, and other. *Id.* at 8.

86. D. Waterman & A. Grant, "Narrowcasting" on Cable Television: An Empirical Assessment (Annenberg School of Communications, University of Southern California Working Paper, 1989).

87. Arts & Entertainment Network, Black Entertainment Television, Christian Broadcasting Network, Cable News Network, C-SPAN, Discovery, ESPN, Eternal Word Television, Financial News Network, Headline News, Home Shopping Network, the Learning Channel, Lifetime, MTV, the Nashville Network, National Jewish Television, Nickelodeon, the Silent Network, Spanish International Network, Tempo, USA, VH-1, the Weather Channel, WGN, WOR, WTBS.

88. American Movie Classics, Bravo, Cinemax, Disney Channel, Galavision, Home Box Office, Home Theater Network, the Movie Channel, Nostalgia Channel, the Playboy Channel, Showtime.

89. CBS, NBC, and ABC.

matter,⁹⁰ origin,⁹¹ and format⁹² and then obtained Nielsen ratings for nineteen networks on which ratings were available. Waterman and Grant found that cable networks offered a huge increase in the number and diversity of offerings over those available on the three broadcast networks. The increase included offerings in such categories as "classical/ethnic music or dance" and "foreign language"—categories in which ABC, NBC, and CBS offered nothing.⁹³ The authors concluded that the expansion of channel capacity in cable television produced a substantial amount of new diversity in programming. This supports the basic model of minority-interest programming developed above.

C. PUTTING THE RACE AND SEX OF THE OWNER OF BROADCAST STATIONS INTO THE MODEL OF MINORITY-INTEREST PROGRAMMING

This section will ask how the race and sex of the broadcasting station owner might be included in the programming models discussed above. I will review the three most obvious possibilities. First, race and sex might be irrelevant. Second, minority or female owners of stations might engage in some consumption through choice of programming that does not maximize profits. Third, minority or female owners might have cost advantages (vis-à-vis white males) in broadcasting minority-interest programming.

1. *Race and Sex Might Be Irrelevant to Programming Decisions of Owners*

It is possible that all owners, regardless of race or sex, are motivated by the desire for profit. Further, talent and cost-effectiveness at broadcasting different formats might be randomly distributed across races and sexes. If these statements are true, the models used above would not be altered at all, and any empirical investigation, after controlling for all other factors (such as number of stations in a market), would find that formats should be distributed randomly across races and sexes.

In fact, it is even possible that the null hypothesis is correct but that we will find that minority owners program for minority audiences more frequently than do white males. The models of programming choice described above showed that as the number of outlets increased, minority

90. E.g., children's, public affairs.

91. E.g., first run.

92. E.g., informational, dramatic.

93. D. Waterman & A. Grant, *supra* note 86, table 2.

programming tended to become more and more profitable for broadcasters. We shall find that the FCC's policies, which are designed to increase the number of stations, may have spurred more minority programming.⁹⁴ The FCC, using its minority preferences in comparative hearings, may have given a large number of the new broadcasting stations to minorities.⁹⁵ These new owners may have found that minority programming was the most profitable broadcasting format to choose. Hence, we might find new broadcasting owners, themselves racial or ethnic minorities, choosing to program for minority audiences even though the new owners desire only profits and have no cost advantage in programming for minority groups.

2. *Race and Sex Might Be Important Because of Consumption Behavior*

Female or minority station owners might be motivated by consumption as well as profit maximization. This might be because the owner desires to see programming of personal appeal on the air, or it might be that the owner feels "solidarity" with the owner's group. Women might feel that they owe it to their oppressed sisters to broadcast female-oriented material, regardless of whether or not some profits must be sacrificed. Black, Hispanic, and other minority owners might have similar feelings about broadcasting for their respective minority groups. But whatever the source of these feelings, such owners might be willing to sacrifice profits to present minority-interest programming.⁹⁶

How would such an insight affect the models discussed above? We will work with a modification of Beebe's paper, mainly because it is most

94. See *infra* p. 327 (insight 4).

95. In addition, the FCC's professed preference for "local ownership" may have concentrated black and Hispanic ownership in communities with large black and Hispanic audiences. As a result, for purely profit-oriented reasons, black owners may program for minority audiences more than the average white owner does.

96. Obviously, I am discounting any false-consciousness, "identification with oppressor" argument that would cut in the opposite direction.

The consumption argument is related to, but distinct from, the recent claim that nonwhites and women speak with a different "voice." The claim about "voice" is, at core, an argument that minorities and women experience life in different ways than do white men and that these different experiences manifest themselves in a different set of perceptions and, perhaps, normative descriptions of reality. See, e.g., Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561 (1984) (making the incendiary suggestion that liberal white law professors should stop writing about civil rights so as to make room for minorities); Matsuda, *Affirmative Action and Legal Knowledge: Planting Seeds in Plowed-Up Ground*, 11 HARV. WOMEN'S L.J. 1 (1988) (giving examples of how minority status might make a difference). See also D. BELL, AND WE ARE NOT SAVED 140-61 (1987); Bell, Bakke, *Minority Admissions, and the Usual Price of Racial*

easily adapted to demonstrate the probable changes. Within Beebe's model, we will designate a minority owner as "M" and assume that M will choose to program minority-taste programming (that which is the first choice of the smallest group) as long as the practice garners an audience size that is at least within X viewers of M's next-best alternative. To understand this approach, we will work through several examples that rely on table 6 below, which is a slight modification of the scheme in Beebe's article.

TABLE 6
GROUP SIZE UNDER ALTERNATIVE DISTRIBUTIONS

	A. Highly Skewed Distribution	B. Moderately Skewed Distribution	C. Nearly Rectangular Distribution
g 1	8,000	5,000	1,077
r 2	1,600	2,500	970
o 3	320	1,250	872
u 4	64	625	785
p 5	12	313	707

ORDINAL RANKING OF PROGRAM TYPES BY VIEWER GROUPS

	1. Viewers watch only first choice					2. Viewers have unique lesser choice					3. Viewers have a common lesser choice (common denominator)				
	Viewer group number					Viewer group number					Viewer group number				
	1	2	3	4	5	1	2	3	4	5	1	2	3	4	5
Programs	1					1	2				1	2	2	2	2
	2	1				1	2				1				
	3		1				1	2				1			
	4			1				1	2				1		
	5				1				1					1	

In the following examples, we will assume that there are three competitive broadcasters. First we will compute the expected equilibrium, given assumptions about the size of viewer groups and the

Remedies, 67 CALIF. L. REV. 3 (1979); Bell, *Strangers in Academic Paradise: Law Teachers of Color in Still White Schools*, 20 U.S.F. L. REV. 385 (1986).

For a critical review of this literature, see Ball, *The Legal Academy and Minority Scholars*, 103 HARV. L. REV. 1855 (1990); Barnes, *Race Consciousness: The Thematic Content of Racial Distinctiveness in Critical Race Scholarship*, 103 HARV. L. REV. 1864 (1990); Brewer, *Introduction: Choosing Sides In the Racial Critiques Debate*, 103 HARV. L. REV. 1844 (1990); Delgado, *Mindset and Metaphor*, 103 HARV. L. REV. 1872 (1990); Espinoza, *Masks and Other Disguises: Exposing Legal Academia*, 103 HARV. L. REV. 1878 (1990); Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989).

configuration of viewer preferences. Then we will ask how the analysis might change if one of the broadcasters were a minority-group member.

Example 1A: Viewers watch only their first choice, and viewer groups are highly skewed.

If we have viewer-preference pattern 1 with group distribution A and there are three channels, each run by a profit-maximizing competitor, the competitors will produce program type 1 on three different channels and split 8,000 viewers three ways (2,666 viewers each). Now let us assume that one of the broadcasters is M, who by definition comes from the smallest group, group 5. M has a desire to show programming that appeals to M's group. If M does so, however, M will get only 12 viewers, a drop of 2,654 viewers. Only if M has an extremely intense preference for this sort of consumption will M show type 5 programming. If M does show type 5 programming, the remaining two broadcasters will get 4,000 viewers each by showing programming type 1.

Example 1B: Viewers watch only their first choice, and viewer groups are moderately skewed.

If we have viewer-preference pattern 1 with group distribution B, the three competitors will show two versions of programming type 1 and one version of programming type 2. Each broadcaster will get 2,500 viewers. Now, if M is one of the broadcasters, M must be willing to get only 313 viewers instead of 2,500, a drop of 2,187 viewers, to broadcast programming type 5. If M were to show type 5 programming, either the remaining two profit-maximizing broadcasters would both show programming type 1, producing 2,500 viewers each, or one broadcaster would show type 1 and the other would show type 2 programming, producing 5,000 and 2,500 viewers, respectively.⁹⁷

Example 1C: Viewers watch only their first choice, and viewer groups are distributed nearly rectangularly.

If we have viewer-preference pattern 1 with group distribution C, the three competitors will show one version each of programming types 1, 2, and 3. The broadcasters will get 1,077, 970, and 872 viewers, respectively. If M is one of the broadcasters, M's decision to show

97. The broadcaster who might show type 2 programming would be indifferent to doing so or showing type 1, for both strategies produce 2,500 viewers. The broadcaster who shows type 1 programming can do no better, regardless of what the other broadcaster decides to do. The expected audience size would therefore be $(5,000 + 2,500 + 2,500 + 2,500)/4 = 3,167$ for each, assuming that the two outcomes were equally probable.

programming type 5 will get only 707 viewers. The number of viewers M would have to give up depends, of course, on whether M would show programming type 1, 2, or 3 if M were to forgo showing type 5. If we assume that the three alternatives are equally probable, we can calculate M's expected audience from forgoing type 5 as $(1,077 + 970 + 872)/3 = 973$. Hence, M would need to give up 266 viewers ($973 - 707$) to show type 5 programming. If M were to show program type 5, the remaining two profit maximizers would show types 1 and 2 and would get 1,077 and 970 viewers.

These three examples illustrate how the minority status of owners is included within the model. The examples also produce an important insight:

Insight 1: As the distribution of viewer tastes becomes more rectangular, minority owners need to sacrifice less to satisfy a taste for broadcasting minority programming.

In example 1A, M had to sacrifice 2,654 viewers (26.5% of the total) to show type 5 programming. In example 1B, M had to give up 2,187 viewers (22.6% of the total) to show type 5 programming. And in example 1C, M had to give up 266 viewers (6.0% of the total). Clearly, the "cost" of showing type 5 programming falls as the distribution becomes more rectangular. This means that, for example, it will be far less costly for a black owner to broadcast black-oriented material in areas with substantial black populations, such as Los Angeles and New York, than in areas with relatively fewer blacks, such as Phoenix or Salt Lake City.

Example 2A: Viewers have unique second choices, and viewer groups are highly skewed.

If we have viewer-preference pattern 2 with group distribution A, the three competitive programmers will show three versions of type 1 programming and get 3,200 viewers each. (Recall that viewers in group 2 will watch type 1 programming if no type 2 programming is available.) If M is one of the broadcasters, M will have to give up 3,188 viewers ($3,200 - 12$) to satisfy a preference for showing type 5 programming. If M were to do so, the remaining two profit-maximizing broadcasters would each show type 1 programming and get 4,800 viewers.

Example 2B: Viewers have unique second choices, and viewer groups are moderately skewed.

If we have viewer-preference pattern 2 with group distribution B, the three competitors will show two versions of type 1 programming,

getting 2,500 viewers each, and one version of type 2 programming, getting 3,750 viewers. The expected audience size is therefore $(2,500 + 2,500 + 3,750)/3 = 2,917$ viewers. If M is one of the broadcasters, M must give up 2,604 viewers $(2,917 - 313)$ to show type 5 programming. If M were to do so, the remaining two broadcasters would show one version of type 1 and one version of type 2 programming, garnering 5,000 and 3,750 viewers, respectively.

Example 2C: Viewers have unique second choices, and viewer groups are distributed nearly rectangularly.

If we have viewer-preference pattern 2 with group distribution C, the three competitors will engage in a cycle, showing each of programming types 1, 2, 3, and 4 seventy-five percent of the time. The cycle will be $(1,2,3) \rightarrow (2,3,4) \rightarrow (1,3,4) \rightarrow (1,2,3)$.⁹⁸ This gives an average of 926 viewers per broadcaster. If M is one of the broadcasters, M must give up 219 viewers $(926 - 707)$ to show type 5 programming. If M were to do so, the remaining cycle would be $(1,2) \rightarrow (2,3) \rightarrow (1,3) \rightarrow (1,2)$, producing an average of 973 viewers for each of the two remaining broadcasters.

Example 3A: Viewers have a common-denominator choice, and viewer groups are highly skewed.

If we have viewer-preference pattern 3 with group distribution A, the three competitors will show three versions of type 1 programming, attracting 3,332 viewers to each channel. If M is one of the broadcasters, M must give up 3,320 viewers $(3,332 - 12)$ to show type 5 programming. If M were to do so, the remaining two broadcasters would both show versions of type 1 programming and get 4,992 viewers apiece.

Example 3B: Viewers have a common-denominator choice, and viewer groups are moderately skewed.

If we have viewer-preference pattern 3 with group distribution B, the three competitors will show three versions of type 1 programming, getting 3,229 viewers each. If M is one of the broadcasters, M must give up 2,916 viewers $(3,229 - 313)$ to show type 5 programming. If M were

98. To see how this works, assume that the three competitors are showing types 1, 2, and 3 to start with. If this is true, the broadcaster who is showing type 1 can improve viewership by showing type 4, which gets $785 + 707 = 1,492$ viewers, which is much better than the 1,077 viewers that broadcaster got for showing type 1. Once that broadcaster makes the switch, the three broadcasters are showing 2, 3, and 4. But in this case the broadcaster showing type 2 can do better by showing type 1, for that gets everyone in group 1 and in group 2. Once that broadcaster makes the switch, the three broadcasters are showing 1, 3, and 4. And so on.

to do so, the remaining two broadcasters would each show type 1 programming and get 4,687.5 viewers.

Example 3C: Viewers have a common-denominator choice, and viewer groups are distributed nearly rectangularly.⁹⁹

If we have viewer-preference pattern 3 with group distribution C, the three competitors will show three versions of type 1 programming and get 1,470.3 viewers each. If M is one of the broadcasters, M must give up 763.3 viewers (1,470.3 - 707) to show type 5 programming. If M were to do so, the remaining two broadcasters would each show type 1 programming and get 1,852 viewers.

Table 7 reveals the pattern that emerges.

TABLE 7
PERCENTAGE OF TOTAL AUDIENCE THAT MUST BE GIVEN
UP BY M TO SHOW TYPE 5 PROGRAMMING

Viewer Preference Pattern		1	2	3
Viewer Group Dist.	A	26.5	31.9	33.2
	B	22.6	26.9	30.1
	C	6.0	5.0	17.3

Table 7 clearly supports insight 1; as viewers are more nearly rectangularly distributed, the cost of serving minorities falls. This remains true regardless of the viewer-preference pattern. But table 7 also provides some support for another insight.

Insight 2: Serving minority groups becomes more costly if viewers are willing to watch common-denominator programming. The figures in column 3 provide support for this proposition. The reason for this is quite intuitive. If viewers are all willing to watch common-denominator programming, M is forced to forgo viewers from all other groups by choosing to show type 5 programming.

Now consider what would happen if one of the two remaining broadcasting licenses in each market were given to a second minority-group member (M2). Table 8 gives the percentage of the viewership market that M2 would have to give up to satisfy a taste for showing type

99. Using the original assumptions about preference distribution from Beebe's article complicates the programming solution but does not change average viewership levels. In case 3C, for example, the solution would be a cycle, (1,2,3) → (1,4,3) → (1,4,2) → (1,3,2).

5 programming, on the assumption that M has already decided to show type 5 programming.

TABLE 8
PERCENTAGE OF TOTAL AUDIENCE THAT MUST BE GIVEN
UP BY M2 TO SHOW TYPE 5 PROGRAMMING IF
M IS ALREADY SHOWING TYPE 5

Viewer Preference Pattern		1	2	3
Viewer Group Dist.	A	40.0	48.0	49.9
	B	31.1	43.5	46.8
	C	15.2	14.0	34.0

Note that, in every type of market, M2 must give up more, usually much more, to provide a *second* source of type 5 programming. This is due to two factors. First, M2 must forgo a share of the increased audiences that watch the remaining profit-maximizing broadcasters. Second, M2 must share group 5 with M.

Even if M2 were to decide to pay this cost, it is by no means clear that two versions of type 5 programming would be broadcast. Once M2 began broadcasting type 5 programming, *M would also pay the "prices" listed for M2*. M's share of group 5 would be cut in half by M2's actions, and if M were to choose the pure profit-maximizing strategy, M could get the big audiences that two profit maximizers would split. Hence, once M2 broadcasts type 5 programming, M may choose to broadcast profit-maximizing material.

Insight 3: Adding a second minority broadcaster to a market is less likely to produce a second source of minority programming than adding the first minority broadcaster was likely to produce a first source of minority programming.

Other examples, in which we alter the number of broadcasting channels, provide further insights into the programming choices of a minority broadcaster in a competitive market.¹⁰⁰

100. I will not discuss examples with monopoly in them for two reasons. First, there is no reasonable likelihood that the U.S. broadcasting system will be reorganized as a monopoly. Second, if a monopoly were to gain control of U.S. broadcasting, I strongly suspect it would be run by upper-class white males who would have no interest in presenting minority-interest programming, except insofar as broadcasts of PGA tournaments count as minority programs.

However, I should point out that if a monopolist interested in presenting minority-interest programming were to gain control, the monopolist could often satisfy its tastes at lower cost than a competitor could. For example, in case 3C, a monopolist could show type 5 programming *at no cost to itself* at all, whereas a competitor would have to give up a great deal.

Example 4: Viewers will watch only their first choices, and viewers are distributed nearly rectangularly.

If we have viewer preference pattern 1 with group distribution C but there are four channels run by four competitive broadcasters, the competitors will show programming types 1, 2, 3, and 4. If we then were to add a fifth channel and a fifth broadcaster, the fifth broadcaster would show type 5 programming. If the fifth broadcaster happened to be M, we would observe M choosing to show type 5 programming.

In example 4, the expansion of channel capacity makes it profitable to show minority-interest programming. M's decision to do so, however, reveals nothing about M's motivation. M might be a profit maximizer, and M's decision to show type 5 programming might be nothing more than good business judgment.

Insight 4: Observing that new channels in a market are allocated to minorities who choose to program for minority audiences does not necessarily support the presumption that minority broadcasters have a taste for minority broadcasting.

Example 5: Viewers will watch only their first choices, and viewers have a moderately skewed distribution.

Consider the situation where we have viewer preference pattern 1, group distribution B, fifteen channels run by competitors, and broadcasters must get at least 600 viewers to break even. Competitive broadcasters will show eight versions of type 1 programming, four versions of type 2 programming, two versions of type 3 programming, and one version of type 4 programming. Each broadcaster will draw 625 viewers. If M is one of the broadcasters, M will have to sacrifice 312 viewers ($625 - 313$) to show type 5 programming. This amounts to half of M's expected audience but only 3.2% of the audience total. This is far less than the 22.6% of the market M would have to give up if there were only three broadcasters.

Insight 5: Increasing the number of outlets reduces the cost to minority broadcasters of satisfying a taste for serving minority consumers.

Putting together insights 1 through 5, we can see that a policy of awarding broadcasting licenses to minorities as a means of increasing minority broadcasting is most likely to work when the market has a substantial minority population that is not currently served, despite the existence of many outlets in the community. However, if we simultaneously increase the number of outlets in a community and give one or

more of the new outlets to minority owners, we cannot know, a priori, whether any new service to minorities is due to the increase in outlets or to a taste for minority programming on the part of the new owners.

3. *Race and Sex Might Be Important Because of Production-Cost Advantages*

This explanation suggests that minority-group members might tend to program for members of their own group because minority owners have lower costs of doing so than do white males. Because costs are less, break-even audience sizes will be smaller, and a minority format that looks like a money loser to a white male owner will appear profitable to a minority owner.

When and why would this explanation be right? After all, a skeptic might suggest, a white male owner can hire black, Hispanic, Asian, or female program managers. These managers could program for minority audiences, using whatever special virtues membership in the minority group bestows on the manager to raise the station's ratings to the highest possible level. Specially talented minority managers would be rewarded with higher salaries by profit-maximizing white male owners. In sum, being a minority owner will provide no advantage—or, at best, an advantage equal to the cost of hiring a manager (less the owner's best alternative wage).

The skeptic's account is incomplete. There is substantial literature in economics and law about the difficulties of monitoring an agent's performance.¹⁰¹ Principals never know with certainty how well an agent is performing and must make guesses about rewarding or punishing an agent based upon the performance of the enterprise. Because the performance of the enterprise depends upon many other factors, some of which are random, the principal has a difficult task. Anything that reduces the cost to the principal of evaluating the agent's performance will give the principal a cost advantage in production.

I suggest that the production-cost explanation is strongest when membership in a minority group gives a minority owner an advantage in

101. An excellent review of the entire area is Holmstrom & Tirole, *The Theory of the Firm*, in 1 HANDBOOK OF INDUSTRIAL ORGANIZATION 61 (R. Schmalansce & R. Willig eds. 1989). Classics in the field include Holmstrom, *Moral Hazard and Observability*, 10 BELL J. ECON. 74 (1979); Ross, *The Economic Theory of Agency: The Principal's Problem*, 63 AM. ECON. REV. 134 (1973); Simon, *A Formal Theory of the Employment Relationship*, 19 ECONOMETRICA 293 (1951). See also Tirole, *Hierarchies and Bureaucracies*, 2 J. L. ECON. & ORGANIZATION 181 (1986).

monitoring the performance of a station manager. This explanation varies in likelihood and in strength for different minority groups.¹⁰²

a. *Spanish language (and other non-English-language) broadcasters:* Consider the case of non-English-language stations, most of which are Spanish-language stations. These stations broadcast to particular minority communities that are isolated from mainstream, majority culture not only by customs and housing patterns but also by language. A white male owner who presumably does not know the language and who almost certainly does not live in the minority community or share in emerging social customs, trends, and fads will be at a great disadvantage in trying to judge the performance of a minority broadcast programmer. The owner will not even be able to understand the content of his own station. Even if he could, he would have no way of judging the quality of his programmer's strategy for attracting large numbers of minority listeners and viewers. After all, the programmer might be spending very little mental effort on the task, choosing to program safe, boring, middle-of-the-road fare, despite changes in the community that would enable a different strategy to capture greater ratings. The white owner would have no way of knowing whether or not this were true. In contrast, a minority owner who presumably speaks the language and comes from the community would suffer no such disadvantage.¹⁰³

b. *Black community broadcasting:* Second, black owners who broadcast for black communities probably have comparative advantages similar to, but smaller than, those enjoyed by Hispanic owners who broadcast in Spanish. American blacks tend to live in distinct areas and

102. Again, a skeptic might reply, the argument in text is irrelevant to justifying minority preferences in broadcasting. All a production-cost advantage suggests is that white owners should sell stations to minority purchasers, who will be able to realize the increased profits from lower costs. Although the skeptic has a point, there are two replies that can be made. First, the minority preferences save on subsequent transaction costs. Second, there may be capital market imperfections that make it too costly for minorities to borrow money to purchase stations on the basis of asserted cost advantages. For an argument that capital market imperfections exist, see FEDERAL COMMUNICATIONS COMM'N, MINORITY OWNERSHIP IN BROADCASTING 11-17 (1978); Honig, *supra* note 10, at 875-76. For a set of interview data indicating that black owners of radio stations believe that market imperfections, particularly in finance, preclude blacks from purchasing broadcast properties, see Current Topic, *Are Minority Preferences Necessary? Another Look at the Radio Broadcasting Industry*, 8 YALE L. & POL'Y REV. 380 (1990) (authored by Akosua B. Evans).

103. This is not to say that the minority owner would be able to monitor the managers without any cost. I am arguing only that minority owners from groups that speak languages other than English are likely to have significantly lower costs of monitoring managers' performance. To the extent that a white owner speaks Spanish and reads *La Opinion*, for example, the white owner will suffer a much smaller comparative disadvantage.

produce separate cultural trends.¹⁰⁴ "Rap music" is probably the most obvious example within the last few years. Many American blacks also speak a dialect of English that is significantly different from the English spoken by white Americans.¹⁰⁵ These factors will combine to give many American blacks an advantage in monitoring the performance of a manager who is programming for the black community. However, these advantages will be smaller than those enjoyed by Hispanic owners because black English is much closer to white English than is Spanish. Moreover, many American blacks who have enough money to purchase a broadcasting station will tend to come from middle- and upper-class communities that share much more with white America than they do with the lower-middle- and lower-class black target audiences of black programming.¹⁰⁶ In addition, the tastes of black audiences for radio programming have been moving toward the white mainstream to the extent that black radio programmers have been forced to play songs by white artists to lure black listeners.¹⁰⁷

c. *Female broadcasters:* Women broadcasters who program special material for other women present one of the most difficult cases. Women as a group are much more diverse, numerous, and dispersed than are the other groups discussed. For these reasons, exactly what women's programming includes is much less clear. Perhaps programs geared to the special biological concerns of women—menstruation, childbearing, breast-feeding, menopause, and diseases of female organs—would be included. Perhaps programs aimed at special social and economic concerns of women would also be included. But these programs alone cannot fill even a substantial portion of a radio or TV format. Some

104. For a review of literature confirming this, see Poindexter & Stroman, *Blacks and Television: A Review of the Research Literature*, 25 J. BROADCASTING 103, 110-13 (1981).

105. See J. DILLARD, *LEXICON OF BLACK ENGLISH* (1977); E. FOLB, *RUNNIN' DOWN SOME LINES: THE LANGUAGE OF BLACK TEENAGERS* (1980); G. SMITHERMAN, *TALKIN AND TESTIFYIN: THE LANGUAGE OF BLACK AMERICA* (1977). See also Martin Luther King, Jr. *Elementary School v. Ann Arbor School Dist. Bd.*, 473 F. Supp. 1371 (E.D. Mich. 1979).

106. Lower-middle- and lower-class blacks must be the target audience because there are so few blacks in the middle and upper classes. In 1987, 7.5% of American black households earned incomes of \$50,000 or more, as compared with 19.7% of white households. STATISTICAL ABSTRACTS OF THE UNITED STATES 440 (1989).

107. Hunt, *Black Radio Debates the Inclusion of White Artists*, L.A. Times, Mar. 26, 1989, Calendar, at 5. The article contains complaints by black radio programmers about the need to program white artists into the schedule and laments the loss of genuine black radio formats. A skeptic might interpret these complaints as the managers' unhappiness with the slightly reduced value of their skills at programming for a specialized market. On the question of black-oriented radio and its place in the market, see Grein, *Motown on the Road to a Comeback*, L.A. Times, July 30, 1989, Calendar, at 70; Hochman, *Black Rock Coalition Pushes for an End to "Musical Apartheid"*, L.A. Times, June 14, 1989, Calendar, at 1, col. 1.

entertainment programming would also need to be included, but there is very little that would seem to appeal only to women. The most likely examples of network shows with strongly female audiences are *Cagney and Lacey* and *Kate and Allie*,¹⁰⁸ but these shows have also drawn very large numbers of men.

A female owner, who is probably more acutely aware of the social and economic discrimination historically suffered by women, might have *some* advantage in monitoring the performance of a manager who is programming for the female audience. But because women as a group speak essentially the same language that men do and live in the same places, it is unclear why any such monitoring advantage should be large.¹⁰⁹

108. According to figures supplied by CBS, the ratings for the two shows were as follows:

CAGNEY & LACEY

TV SEASON	WOMEN 18 +				Men 18 +			
	RTG	SH	RTG	(000)	% DIST	RTG	(000)	% DIST
1981-82	15.2	24	12.3	10,380	53.1	9.7	7,360	37.6
1982-83	15.2	24	11.3	9,780	52.0	9.0	6,980	37.1
1983-84	20.9	36	16.3	14,270	55.7	12.0	9,460	36.9
1984-85	16.9	28	13.6	12,050	58.0	8.8	6,990	33.6
1985-86	16.7	27	13.6	12,160	57.9	8.6	6,960	33.2
1986-87	15.1	24	12.1	11,010	59.8	6.6	5,488	32.1

Source: NTI

KATE & ALLIE

TV SEASON	WOMEN 18 +				MEN 18 +			
	RTG	SH	RTG	(000)	% DIST	RTG	(000)	% DIST
1983-84	21.9	33	18.2	15,910	52.6	11.7	9,240	30.6
1983-85	18.3	27	14.9	13,220	52.4	9.3	7,400	29.3
1985-86	20.0	29	16.7	14,980	51.7	10.1	8,140	28.1
1986-87	18.3	27	15.9	14,480	53.4	8.9	7,290	26.9
1987-88	14.7	22	12.3	11,295	55.6	7.5	6,198	30.5
1988-89	13.1	20	10.8	10,113	56.8	6.8	5,715	32.1

Source: NTI

UNIVERSES

TV SEASON	HOUSEHOLDS (000)	WOMEN 18+ (000)	MEN 18+ (000)
1981-82	81,500	84,720	76,140
1982-83	83,300	86,350	77,770
1983-84	83,800	87,480	78,870
1984-85	84,900	88,570	79,850
1985-86	85,900	89,560	80,800
1986-87	87,400	90,830	81,980
1987-88	88,600	91,900	82,980
1988-89	90,400	93,410	84,470

Source: NTI

109. This does not of course preclude the possibility that many women might have a strong taste for broadcasting for other women.

d. *Modeling the cost advantage:* How should we incorporate an owner's cost advantage in monitoring managers into the models of broadcast competition? A cost advantage plays exactly the same role as a taste for broadcasting minority programming. The model in preceding sections included a taste for minority programming, defined as the willingness of an owner to give up a number of viewers to broadcast minority programming. A profit-maximizing broadcaster who has a cost advantage at broadcasting to minority audiences will be willing to give up nonminority viewers to do so, other things being equal, if the lost advertising revenues are less than the broadcaster's cost advantage. A large cost advantage translates into a willingness to give up many viewers, just as does a strong taste for minority programming. Thus the general lessons from the previous models should be applicable here.

A policy of awarding broadcast licenses to minorities and women so as to increase programming targeted at these groups will be most effective in a market with substantial minority populations that are not currently served by any of the large number of outlets in that market. In addition, to the extent that the policy depends upon cost advantages, it will be most effective for owners from non-English-language minorities, slightly less effective for black owners, and least effective for women owners.

4. *Potential Problems with the Models*

Are these theoretical results of interest to a court that is testing the minority preference policies, or are there serious problems that prevent using the theories to analyze the policies? Several potential problems suggest themselves:

a. *Federal Communication Commission policies may affect the choice of programming by profit-maximizing broadcasters:* Applicants for broadcasting stations may believe that proposing to present minority programming increases the chance of gaining the license. Similarly, incumbent broadcasters may well believe that presenting some minority programming increases the chance of a smooth, low-cost renewal. In fact, the FCC has gone so far as to suggest that every broadcasting station must program *some* minority material.¹¹⁰ However, other FCC policies may have *increased* the cost of presenting minority programming.

110. See Network Programming Inquiry, *supra* note 6, at 7295 (requiring programming in 14 different categories, including programs for children, religious programs, educational programs, public affairs, editorials, politics, agriculture, news, weather, sports, minority programming, local self-expression, programs with local talent, and entertainment).

For example, the FCC now claims that its administration of the fairness doctrine raised the cost of presenting nonmainstream political views to the public.¹¹¹

b. *The models only attempt to predict "type" of service to groups with minority tastes for broadcast programming:* The models' definition of "minority" programming as that desired by a minority group may fail to capture the subtle differences that might support the minority preference policies. It may be that minority and female owners would program the same types of material as white males but would do so in slightly different ways. For example, there might be a subtle difference in the slant with which the news is presented, so that interpretations of events more congenial to minority or female interests are aired. Viewers might be indifferent to the distinction (in terms of the decision about whether or not to watch) but still might garner a somewhat different set of views about the world from watching.¹¹²

c. *The models neglect the influence of cable television and other methods of delivering minority programming:* One can always purchase Spanish-language records and tapes, after all. To understand how cable, records, and tapes would affect the analysis, hold the number of viewers of type 1 through type 4 programming constant. Now suppose that viewers of type 5 material do not regard commercial announcements as a cost but are highly sensitive to the out-of-pocket costs of purchasing cable, records, or tapes. In this case, if no one in the market is showing type 5 material, a broadcaster could pick up *all* of the minority viewers by showing type 5 programming. On the other hand, if the viewers of type 5 programming are sensitive to the implicit costs of commercial announcements, some will choose to purchase commercial-free material and remove themselves from the pool of viewers who prefer broadcasted type 5 programming. Type 5 programming will then appear less attractive to broadcasters. Therefore, the extent to which various

111. See Complaint of Syracuse Peace Council Against Television Station WTVH Syracuse, New York, 2 F.C.C. Rcd. 5043 (1987).

112. Two of the witnesses at the Senate hearings in September of 1989 urged arguments something like this upon the Subcommittee on Communications. See *Hearing, supra* note 8 (statement of Percy E. Sutton); *id.* at 29-30 (statement of James L. Winston).

This should not be confused with the related argument that although women do not all think alike about controversial issues, women are much more likely than men to agree that some issues are important and deserve to be treated. See Leiby, *supra* note 46, at 406. This argument does suggest that women owners will program very different material than will men.

minority groups find other sources of minority programming both *available* and *desirable* affects the demand for broadcasted minority programming and thus the programming choices of broadcasters.

Now, if we introduce cable, tape, and record alternatives to the analysis of type 1 through type 4 programming, we will need to determine how many potential viewers are removed from these programming types as compared with type 5 programming. Then we can determine whether type 5 programming becomes more enhanced as a programming option for broadcasters, relative to the nonminority choices. The analysis will likely become quite complex.¹¹³

I suspect that the problems with these models are enough to cause any social scientist to shudder at the idea of using them. However, in this Article I am not trying to figure out whether the state of the art would satisfy a social scientist, but rather whether a court might be willing to use the theories and data to uphold a law under attack. For such a purpose, these models of the effect of race and sex on an owner's programming decisions may provide enough of a basis for a court to proceed to examine the data.

D. DATA ON OWNERSHIP CHARACTERISTICS AND BROADCASTING CONTENT

1. *Early Data*

The few sources of data on the relationship between ownership characteristics and broadcast content suggest nothing inconsistent with the model presented above. In an article published in 1978, Lawrence Soley and George Hough III¹¹⁴ ascertained that the number of black-owned radio stations¹¹⁵ had grown from twelve in 1970 to fifty-six in 1977. They produced the following table, showing that the vast majority of black-owned stations were purchased.

113. The analysis would likely depend upon the relative income levels of those in each of the groups. My guess is that the lower the relative income of a listener or viewer group, the higher the tolerance for commercial announcements and the more likely that group is to demand over-the-air programming. Of course, the lower the income, the less desirable is the group as a target audience. My guess is that blacks, one of the poorest ethnic groups in the United States, would tend to substitute other media for commercial broadcast far less than would Asians, one of the richest ethnic groups in the United States.

114. Soley & Hough, *Black Ownership of Commercial Radio Stations: An Economic Evaluation*, 22 J. BROADCASTING 455 (1978).

115. There was only one black-owned television station in the U.S. *Id.* at 458.

TABLE 9¹¹⁶
METHOD OF ACQUISITION BY BLACK BROADCASTERS

	Before 1970	70-71	72-73	74-75	76-77	Total
Purchase	2	1	13	15	8	39
Other ^a	10	2	0	1	4	17

^a Includes new frequency assignments, bankruptcy acquisitions, and transfers without compensation.

Soley and Hough reported that “[a]ll but two of the stations acquired between 1972 and 1977 have had black-oriented formats, programming primarily rhythm and blues, soul, jazz or gospel music.”¹¹⁷ Thus, there was a significant connection between black ownership and the broadcasting of black-oriented programming. This connection could be consistent with either a “taste” for broadcasting for one’s own group or with a cost advantage at broadcasting for one’s own group.

Soley and Hough also suggested that a disproportionate number of black-owned stations were in the top fifty markets.¹¹⁸ These markets tended to include large cities that had substantial black populations. Recall that satisfying a taste for minority broadcasting or exploiting a cost advantage in minority broadcasting is easier in a market with a substantial minority population. Thus, the location of the black-owned stations is also consistent with the model.

A 1981 article by Loy Singleton directly measured public-service programming on black-oriented radio stations, as contrasted with other radio stations, and found no difference.¹¹⁹ Singleton concluded that granting more broadcasting stations to minority-group members would not increase the amount of public-service programming to minorities. His research, however, was so seriously flawed that no such conclusion could be drawn. The best that can be said for Singleton’s work is that it is consistent with any hypothesis about the connection between ownership characteristics and programming.¹²⁰

116. *Id.* at 459.

117. *Id.* at 461.

118. *Id.* at 460 (table III), 462.

119. Singleton, *FCC Minority Ownership Policy and Non-Entertainment Programming in Black-Oriented Radio Stations*, 25 J. BROADCASTING 195 (1981).

120. Singleton’s most egregious error was his decision to locate all black-oriented radio stations, determine the race of the owners, and then compare the actions of black and white owners who were broadcasting for blacks. This is wildly inappropriate for an evaluation of a policy that first picks an owner by race and then hopes for differential programming output. To understand this, just consider that if black owners were far more likely than white owners to program for blacks, then even if black and white owners *who chose to program for blacks* were to provide equal levels of public-service

Another 1981 article, by Scheiment and Singleton,¹²¹ measured public-service programming by white and Hispanic owners of Spanish-language radio stations and found no difference between the two. These results are also consistent with any hypothesis about the connection between ownership characteristics and programming.¹²²

programming, awarding a license to a black instead of a white, other things being equal, would tend to provide more public-service programming to the black community. In effect, Singleton got the causation element of the minority preference policies backward.

Singleton should have located all black owners and then asked how much community-service programming the black owners provided to the black community, as compared with white owners. Even this data might fail to have much value, however. The ability of black owners to choose the locale of purchased stations might alter the analysis. After all, if black owners were to choose to purchase stations in areas with large (relatively underserved) black populations, then maybe the market demand, and not black owners' bountiful supply, would explain the tendency of blacks to program for blacks. But this argument would make a difference only if black owners were to purchase stations in areas with large black populations for reasons unrelated to the black owners' lower costs of targeting a black audience or special desire to serve a black audience. For example, if black owners were to purchase stations with an eye toward personally running the station and also being able to frequently socialize with many black friends, the black owners' choice might dictate location, and the location would dictate the target audience. In this way we might observe black owners programming for black audiences far more often than nonblack owners, but no cost advantage or desire to serve black audiences would be present. On the other hand, if black owners were to purchase stations in areas with large black audiences *so as to take advantage of lower costs or special desires to serve black audiences*, then the location would be the effect rather than the cause. It would be hard to know, just from staring at the data, which scenario was correct.

121. Scheiment & Singleton, *The Onus of Minority Ownership: FCC Policy and Spanish-Language Radio*, 31 J. COMM. 78 (1981).

122. Scheiment and Singleton use a research design similar to that used by Singleton, but they avoid drawing inappropriate policy conclusions. Scheiment and Singleton suggest that it may be inappropriate to expect Hispanic owners who choose to program in Spanish to provide significantly more public-service programming than do white owners who program in Spanish.

There are also data in David Honig, *Relationships Among EEO, Program Service, and Minority Ownership in Broadcast Regulation*, in *Proceedings from the Tenth Annual Telecommunications Policy Research Conference 83* (Oscar H. Gandy, Jr., Paul Espinosa & Janusz A. Ordovery eds. 1983), that could be consistent with either the taste or the monitoring-cost-advantage hypothesis. Honig finds that black-owned, black-oriented radio stations employed blacks in 72% of all high-level job positions (officials, managers, professionals, technicians, salespersons), while white-owned, black-oriented radio stations employed blacks in 43% of all high-level jobs. The industry averages for blacks were "8.1 percent of professional and 9.3 percent of technician positions in broadcasting, but only 4.3 percent of officials and managers and 4.6 percent of sales positions." *Id.* at 88. In addition, Honig finds that stations with black program service hire twice as many blacks as stations with no such service.

Obviously, as Honig points out, there are several possible causal explanations for his findings. Two easy explanations involve taste (black owners prefer to hire blacks and to program for blacks) and production cost (black owners can monitor the performance of black employees more cheaply, particularly when programming for blacks).

2. *Congressional Research Service Study*¹²³

Recall from previous discussion that, when the D.C. Circuit remanded the *Steele* case to the FCC, one of the central purposes of the remand was to allow the FCC to develop data on the relationship between ownership characteristics and programming content.¹²⁴ To do that, the FCC sent questionnaires to all radio and television licensees, requesting data about the percentage of ownership interest in the license by minority groups and women; about whether the distress sale, comparative hearing preference for women and minorities, or tax certificate policies were "involved" when the station was acquired; about the format (for radio); and (for all stations) about any programming specially targeted at minorities, women, children, or senior citizens.¹²⁵ Seventy-nine percent of all stations responded, but when Congress passed Joint Resolution 395 at the end of 1987, the FCC had to terminate its inquiry.¹²⁶ The Subcommittee on Telecommunications of the House Committee on Commerce and Energy then directed the Congressional Research Service ("CRS") to analyze the responses, and on June 29, 1988, the CRS released the results.

The CRS report first compares the rates at which white-male, minority, and female broadcast station owners choose to program for minorities, women, children, and senior citizens. The CRS lumped together all broadcaster responses into one big pool rather than segregate them by market. The CRS claims that it was forced to do so because the FCC study elicited insufficient market identification and demographic data to make segregation by market feasible and no alternative source of

123. CONGRESSIONAL RESEARCH SERVICE, THE LIBRARY OF CONGRESS, STATISTICAL ANALYSIS OF FCC SURVEY DATA: MINORITY BROADCAST STATION OWNERSHIP AND MINORITY BROADCASTING (1988) [hereinafter CRS]. Study of this quite current data set is crucial for the case of black-oriented radio because of the upheavals in the market since the late 1970s. During that period the disco craze took hold, and many white listeners were added to formerly all-black audiences. When disco died, the urban contemporary ("U/C") format was created. U/C tends to attract a multiethnic audience, with roughly similar numbers of black and white listeners. As a result, the remaining audience for strictly black formats has been reduced. See M. KEITH, RADIO PROGRAMMING: CONSULTANCY AND FORMATICS 165-66 (1987).

124. See *supra* notes 43-49 and accompanying text.

125. The questionnaire also asked about other things, such as degree of integration of ownership into management. The items listed in the text are those of central importance to our inquiry, however.

126. Perhaps I should say that the FCC *chose* to terminate the inquiry. There is a very strong argument that Joint Resolution 395 was unconstitutional. See Sidak, *The Recommendation Clause*, 77 GEO. L.J. 2079 (1989).

such information was available at low cost.¹²⁷ To make up for this deficiency, the CRS chose five large markets¹²⁸ and five small ones,¹²⁹ ran the same comparisons of the programming choices of white-male and other station owners within each market, and then compared the level of minority programming to the percentage of minority population in each market. This last comparison was ostensibly an attempt to ascertain to what extent minority programming was "market driven" rather than driven by ownership characteristics.¹³⁰

What follows is a partial summary of the masses of data presented in the CRS report. However, for some of the general statements I will make, there will be one or more specific counterexamples.

a. *Aggregated data for all stations:* The following chart summarizes the CRS findings on the *number* of broadcasting stations in which minorities hold broadcasting interests.

TABLE 10¹³¹
NUMBER (PERCENT) OF TOTAL STATIONS REPORTING
MINORITY OWNERSHIP

	Less than 51% Ownership		51% or More Ownership	
Black	496	(5.7%)	166	(1.9%)
Hispanic	209	(2.4%)	87	(1.0%)
Asian/Pacific	87	(1.0%)	16	(0.2%)
Indian/Alaskan	62	(0.7%)	39	(0.4%)

NUMBER (PERCENT) OF TOTAL STATIONS REPORTING FEMALE OWNERSHIP

Less than 51% Ownership		51% or More Ownership	
3,091	(35.4%)	619	(7.1%)

Total = 8,720 stations reporting. 7,558 reported no minority owners.
Female ownership was not broken down by race.

Most of these figures for 51% or more ownership are consistent with received wisdom, but the numbers for minority and especially female ownership interest at 50% or less seem higher than most people in the industry believe.

127. CRS, *supra* note 123, at 2-3.

128. The large markets were New York, N.Y.; Dallas, Tex.; Los Angeles, Cal.; Chicago, Ill.; Atlanta, Ga. *Id.* at 3 n.1.

129. The five small markets were Flagstaff, Ariz.; Elmira, N.Y.; Meridian, Miss.; Butte, Mont.; and LaCrosse, Wis. *Id.*

130. The CRS study cautions against leaning very hard on its conclusions precisely because it has no firm handle on separating these effects. *Id.* at 3.

131. *See id.* at 9.

The aggregated comparisons for ownership characteristics and programming choices show several general trends. First, minority owners are more likely to program for their own minority groups than other owners are. For example, 79% of all stations owned (51% or more) by blacks target black audiences. Only 20% of nonblack-owned stations target black audiences. Second, minority owners (51% or more) are no more likely to program for *other* ethnic groups than are nonethnic owners. For example, consider the following table.

TABLE 11¹³²

PERCENT OF STATIONS IN OWNERSHIP GROUPS (50%) BROADCASTING
BLACK PROGRAMMING

Nonblack	Black	Hispanic	Asian/Pac	Ind/Alask	Women
20	79	8	13	13	25

The results for all ethnic groups are limited in table 12 below.

The results also suggest that women are somewhat more likely to program for other women than are men but that women are not, in general, much more likely to program for minorities.

132. See *id.* at 14.

The opposite trend in broadcasting to other ethnic groups is observed for stations with less than 51% minority ownership.

TABLE 13

PERCENT OF STATION IN (51%) OWNERSHIP GROUPS BROADCASTING BLACK PROGRAMMING

Nonblack	Black	Hispanic	Asian/Pac	Ind/Alask	Women
20	60	46	28	39	26

Broadcasting stations with less than 51% black ownership are more likely to broadcast to other ethnic groups. This sort of data is not particularly helpful for several reasons. First, there is no breakdown according to how large a percentage these owners had or the nature of the other owners. If many of the stations that had small percentages of black ownership also had less than 51% ownership interests by other ethnics, this could explain some of these results. Second, the economic models I presented were constructed to explain the programming choices of minorities who controlled the broadcasting stations—in effect, 51% or more owners. For these reasons, I will concentrate on the data from the stations that are owned by minorities and women.

TABLE 12¹³³
 PERCENT OF MEN AND WOMEN OWNERS BROADCASTING
 MINORITY AND WOMEN'S PROGRAMMING

Target Groups for Programming	Men	Women
Women	28	35
Black	19	25
Hispanic	10	10
Asian/Pacific	3	3
Indian/Alaskan	4	5

Which of the three hypotheses about minority and female broadcast station owners—attributing no difference, difference according to minority taste, or difference according to cost advantage—is consistent with these results?

i. *"No difference" hypothesis*: It is possible, but not very likely, that the "no difference" hypothesis can be consistent with these results. First, explanatory variables that have been left out of the model might produce these statistical patterns. For example, it is possible that minority and (to a lesser extent) female licensees have smaller, lower-power stations than do white-male licensees. Small stations might be much better suited to targeting minority and female audiences than large stations, so the tendency for minority owners to program much more for minorities might be explained, in part, by the size of the stations. However, such an explanation fails to account for why minority owners should program so much more for their own groups and less for others.

Example 4, discussed previously,¹³⁴ provides a second possible reconciliation of the data and the "no difference" hypothesis. Example 4 showed that if the number of channels in a market increases, minority broadcasting may become profitable for the first time. If the new channel is allocated to a minority broadcaster, that broadcaster will choose to broadcast minority-interest programming even though that broadcaster is a pure profit maximizer who has no particular cost advantage or taste preference. Could such a scenario have been played out in the American broadcasting industry? Over a ten-year period beginning in 1977, the number of commercial television stations grew from 711 to 986, AM radio stations increased from 4,559 to 4,866, and FM stations climbed

133. See *id.* at 14-18.

134. See *supra* p. 327.

from 4,117 to 5,208.¹³⁵ This growth in the number of broadcast stations occurred during a period when the minority preferences were in effect. Perhaps many of the new stations were given to minorities who just happened to be in markets where minority-program broadcasting was rendered the most profitable alternative by the grant.

Although such an explanation is *possible*, there are several good reasons to be skeptical. First, this explanation relies on a coincidence of the same scenario being played out in market after market. Second, it does little to explain why minorities are broadcasting for their own groups so much more than for other minority groups. This explanation suggests that black broadcasters would program for Hispanics and other minorities quite frequently, but the data does not bear this out. Last, the early article by Soley and Hough¹³⁶ found that the vast majority of black broadcasters bought their stations. If this trend continued, it would be inconsistent with the "no difference" hypothesis. However, to truly rule out this hypothesis, some market-by-market empirical work must be done. But until that work is done, I will regard the "no difference" hypothesis as unlikely.

ii. *The "taste" hypothesis:* Much of the CRS data is consistent with the taste hypothesis developed earlier.¹³⁷ Minority broadcasters target their own groups far more frequently than others do. A sense of group identification, a psychological need to communicate with one's own community, a desire to teach one's own group, a sense of pride in one's ethnic music and culture, and so on, could all explain why minority owners prefer to target their own groups. I have no a priori expectation of why female owners' taste for targeting women should be weaker (or stronger, for that matter) than minority owners' taste for targeting their own communities.¹³⁸

iii. *The "monitoring cost advantage" hypothesis:* The CRS data tracks closely the predictions of the "monitoring-cost advantage" explanation. Hispanic owners, who were predicted to have the largest cost advantages, are 7.4 times more likely to target Hispanic audiences than are non-Hispanic owners. Black owners, also predicted to have significant but slightly smaller cost advantages, are almost 4 times as likely to target black audiences as are nonblacks. Women, who were

135. See BROADCASTING TELEVISION & CABLE FACTBOOK A-13 (1987).

136. Soley & Hough, *supra* note 114.

137. See *supra* Part III, Section C(2).

138. I also have no a priori expectations as to whether white male owners would target white males.

predicted to have only slight cost advantages, are only 1.2 times as likely to broadcast to women as are men. This theory did not predict that minority or female owners would be more likely to target *other* groups, and the data does not show that they are, in general. In sum, the "monitoring-cost advantage" hypothesis does a pretty good job of explaining the data.¹³⁹

b. *Data from five large and five small markets:* The CRS ran comparisons similar to those just described for all broadcasting stations in five large and five small markets. The results for the large markets were quite similar to the national results, but in the small markets there were so few stations with minority owners that the comparisons were rendered meaningless.¹⁴⁰ When the CRS compared the rate of minority-program broadcasting in the large markets with the minority population percentage in the market, it found that nonethnic owners tended to broadcast for minorities at a rate equaling the minorities' percentage in the population. Ethnic owners tended to target minority audiences at a higher rate.¹⁴¹

c. *The data might be worthless:* One possibility is that these results are consistent with everything because they are inherently unreliable. There is no definition of minority programming in the study, and all data are self-reported by licensees. No attempt was made to cross-check the reliability of the reported data. Indeed, any such cross-check would have required a working definition of minority programming. Hence, it is possible that the CRS study was picking up nothing more than different perceptions of minority owners or different self-reporting rates of minority owners.

139. The CRS study also looked at the *type and quantity* of minority-interest programming by various owner groups. Was the programming regularly scheduled, or was it special programming? Did the owner provide more than or less than 20 hours per week of minority-interest programming? The statistical results conform to those described in the text. See CRS, *supra* note 123, at 27-36.

The CRS study also separately examined stations reporting that their owners participated in management. CRS found that stations "with black, Hispanic and Asian/Pacific manager-owners had a higher percentage programming for their own minority audience group and lower percentages for other minority groups." *Id.* at 40. This is consistent with both the taste and monitoring-cost-advantage hypotheses. An owner who managed a station might satisfy personal tastes more frequently at lower cost. Similarly, an owner-manager would be in the best position to use a monitoring-cost advantage, for he would have personal knowledge of the day-to-day operations.

140. The CRS study used data on stations with less than 51% minority ownership interests and found large unexplained differences between national patterns and those found in small markets. *Id.* at 44. This reinforces my decision to use only data from stations where minorities hold ownership interests of greater than 50%.

141. *Id.* at 25.

The CRS study's data on the most commonly used format by black owners—jazz—partially reinforce these concerns. Jazz is definitely a crossover format, like urban contemporary, favored by a large number of black and white listeners.¹⁴² Black owners who program jazz may regard themselves as targeting a black audience, while white owners who program jazz may have no such self-perception. Hispanic owners who program jazz may have something else in mind.

142. Regarding urban contemporary, see M. KEITH, *supra* note 123, at 147.

Some sample radio demographics:

KGFJ

L.A. radio station classified as "black" by Arbitron.

Listeners' Demographics (as supplied by station)

Age: 25 - 54

Male/Female ratio - 50/50

Race percentiles -

Black - 70%

Hispanic - 20%

Other - 10%

Station is both owned and managed by minorities.

KKGO

L.A. radio station, formerly jazz, now jazz and classical.

Listeners' Demographics (as supplied by station, for jazz format)

Age: 25 - 54

Male/Female: 50/50

Income: \$75,000 (professional types)

Race -

White - 75%

Black - 20%

Other - 5%

Station representative said that they expect the demographics that represent the new format to be similar, though they do expect to lose some of the black and Hispanic audience.

Station is managed by black, Hispanic, Filipino minorities.

WBGO

Newark, N.J., public jazz station.

Listeners' Demographics

Age: 30 - 55

Male/Female: 65/35

Income: \$35,000+

Race -

White - 50%

Black - 25%

Latin - 25%

There is no significant minority ownership or management.

KKSF

San Francisco jazz, new-age station.

Listeners' Demographics

Age: 25-54

Male/Female: 50/50

Income: \$50,000+

Race -

White - 80%

Black - 10%

Hispanic - 4%

Other - 6%

There is no significant minority ownership or management.

KBLX

San Francisco R&B, jazz, adult-contemporary station.

Listeners' Demographics

Age: 25-54

Male/Female: 55/45

Income: \$100,000+

Race -

White - 50%

Black - 40%

Other - 10%

The station is minority owned but not minority operated.

KJAZ

Alameda (San Francisco) jazz station.

Listeners' Demographics (as supplied by station)

Age: 25-54

Male/Female: 66/33

Income: \$32,000

Race -

White - 75%

Black - 16%

Hispanic - 4%

Other - 5%

The station is not owned or managed by minorities. It was formerly owned in partnership with Lionel Wilson, the (black) mayor of Oakland, but Wilson was bought out eight years ago.

KLON

Long Beach public jazz station.

Listeners' Demographics

Age: 30-60

Male/Female: 70/30

Income: \$40,000

Race -

White - 33.3%

Black - 33.3%

Other - 33.3%

The station is owned by Cal State Long Beach. Upper management is mostly white.

In addition, there is the possibility that owners gave strategic responses. This questionnaire may have been perceived as a policymaking tool by the owners, who may have dissembled in an effort to shift federal policy toward minority preferences in broadcasting.¹⁴³

3. *Summary and Conclusions*

The problems with the extant data would prevent any reputable social scientist from placing much weight upon them. But faced with the need to come to a decision about the legality of the minority preference policies, a court would have to give more serious consideration to the data. Even so, the early data do virtually nothing to shed light on which of three theoretical positions—"no difference," "taste," or "cost advantage"—is most likely. The CRS study is a small advance and suggests that either the taste hypothesis or the monitoring-cost advantage is the most likely one (although the "no difference" position cannot be ruled out completely). In particular, the monitoring-cost explanation does the best job of predicting the general pattern of CRS results. However, because the CRS failed to evaluate its data against the background of a microeconomic model such as the one presented in this Article, we have no way of knowing how large such a monitoring-cost advantage is likely

WBEZ

Chicago public radio station providing jazz in the evening.

Listeners' Demographics

Age: 25-44

Male/Female: 60/40

Income: \$40,000 - \$75,000

Race -

White - 91.9%

Black - 8.1%

The station's license is held by the Chicago Board of Education; general superintendent of schools and president of the Board of Education are black. There is significant minority management; the new director is a black woman, the station manager a white woman.

WQCD

New York jazz-contemporary station.

Listeners' Demographics

Age: 25-44

Male/Female: 60/40

Race -

White - 45%

Black - 45%

Hispanic - 10%

Owned by Tribune Corp. No significant minority management.

143. In addition, there is the possibility that minority owners' choice of station location was determined by social factors and that location determined broadcast content. See *supra* note 118 and accompanying text. Hence, the data would be worthless for appraising a policy that just targets minority owners' characteristics, rather than station location.

to be for each of the groups or, similarly, how strong is the taste for broadcasting for one's own group.

IV. METRO BROADCASTING V. FCC

In *Metro Broadcasting v. FCC*,¹⁴⁴ the United States Supreme Court upheld the minority preference in comparative hearings and the minority distress-sale policy by an identical five-to-four vote. Justice Brennan, writing for the majority, and Justice O'Connor, writing for the dissenters, disagreed on the role of evidence in determining the relationship between owners' characteristics and their programming choices, as well as just about everything else. I will review *Metro Broadcasting* and highlight the correspondence between the Court's normative presuppositions and jurisprudential approach, as well as the evaluation of the theory and data showing a nexus between ownership characteristics and broadcasting diversity.¹⁴⁵

A. THE DISPUTES

Metro Broadcasting challenged the minority preference in comparative hearings when Metro lost its bid to gain the license to construct a new UHF television station near Orlando, Florida. The FCC granted the application to a competitor, in part because the competitor was 90% Hispanic owned, while Metro was only 19.8% minority owned. The competitor's advantage in minority ownership outweighed Metro's advantages in other areas. The Court of Appeals for the District of Columbia upheld the license award against the claim that comparative-hearing preferences for minorities violated equal protection under the fifth amendment.¹⁴⁶

144. 110 S. Ct. 2997 (1990).

145. A thorough evaluation of racial preferences requires subtle and complex normative, political, historical, economic, and psychological arguments. I have no such grand ambitions for this Article. For a good discussion of many of these issues, see T. SOWELL, *CIVIL RIGHTS: RHETORIC OR REALITY?* (1984); Days, Fullilove, 96 YALE L.J. 453 (1987); Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974); Karst, *Private Discrimination and Public Responsibility: Patterson In Context*, 1989 SUP. CT. REV. 1; Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327 (1986); Rosenfeld, *Decoding Richmond: Affirmative Action and the Elusive Meaning of Constitutional Equality*, 87 MICH. L. REV. 1729 (1989); Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78 (1986); Tribe, *Perspectives on Bakke: Equal Protection, Procedural Fairness, or Structural Justice?*, 92 HARV. L. REV. 864 (1979). For a public-choice theoretic analysis of *Bakke*, see Spitzer, *Multicriteria Choice Processes: An Application of Public Choice Theory to Bakke, the FCC, and the Courts*, 88 YALE L.J. 717 (1979).

146. *Winter Park Communications v. FCC*, 873 F.2d 347 (D.C. Cir. 1989), *aff'd sub nom.*, *Metro Broadcasting v. FCC*, 110 S. Ct. 2997 (1990).

Shurberg Broadcasting of Hartford, wholly owned by Alan Shurberg, applied for a construction permit for a television station in Hartford, Connecticut. The permit would have been inconsistent with the continued operation of another television station, owned by Faith Center. Faith Center had been in some trouble with the FCC for years, and for three years it had been attempting to sell its license to a minority purchaser in a "distress sale." Faith Center's first two attempts to execute a distress sale failed when the purchasers' financing fell through. Six months after Shurberg's application Faith Center asked the FCC for permission to try a third time to execute a distress sale, this time to Astroline Communications. Shurberg opposed the distress-sale policy as a violation of the guarantee of equal protection of the laws. After the FCC rejected Shurberg's opposition and approved Faith Center's petition for a distress-sale, Shurberg appealed to the United States Court of Appeals for the District of Columbia Circuit. The court of appeals ultimately ruled in Shurberg's favor.¹⁴⁷

The Supreme Court agreed to hear appeals from both decisions and consolidated the cases. The following sections will detail the majority and dissent, highlighting their views on the role of evidence on the connection between ownership characteristics and programming choices.

B. THE MAJORITY OPINION

Justice Brennan, writing for Justices Blackmun, Marshall, White, and Stevens, held that benign racial classifications enacted by the United States Congress pass the requirements of equal protection if "they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives."¹⁴⁸ In short, this test requires the court to look for good reasons that serve as the ultimate objective of the challenged law and then determine if racial classifications implement the objective at sufficiently low cost. This approach was culled from two of the four Supreme Court opinions evaluating the constitutionality of programs that use explicit racial classifications to help minority groups and disadvantage whites.¹⁴⁹

147. *Shurberg Broadcasting v. FCC*, 876 F.2d 902 (D.C. Cir. 1989), *rev'd sub nom.*, *Metro Broadcasting v. FCC*, 110 S. Ct. 2997 (1990).

148. *Metro Broadcasting*, 110 S. Ct. at 3009.

149. *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

The first of these, *Regents of the University of California v. Bakke*,¹⁵⁰ tested the legality of a medical-school affirmative action program. The University of California at Davis medical school had set aside sixteen places in its class exclusively for minorities. Whites could compete for the other eighty-four places. Only five members of the Court addressed the constitutional issue of whether the U.C. Davis program violated the fourteenth amendment. Justice Brennan, writing for himself and Justices White, Marshall, and Blackmun, applied a form of intermediate scrutiny virtually identical to that adopted in *Metro Broadcasting*. Brennan upheld the U.C. Davis program, first finding that remedying society-wide discrimination provided an important governmental interest and then holding that setting aside some places in the class for minorities was substantially related to remedying discrimination. Justice Powell, in a pivotal opinion, applied strict scrutiny—demanding a compelling state interest and demanding that the racially explicit criteria be narrowly tailored and necessary to achieving the compelling state interest. Remedying societal discrimination, said Justice Powell, was not a compelling state interest because it is completely unbounded. However, producing a racially diverse student body would be a compelling state interest, for much informal learning takes place through casual interaction, and a diversity of backgrounds in student bodies produces more learning. But, Justice Powell cautioned, race must not be the only factor, for other elements also aid learning. Therefore, race must be balanced and weighed against other elements, such as “personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor.”¹⁵¹

The second case, *Fullilove v. Klutznick*,¹⁵² produced many opinions. The Supreme Court upheld a provision of the Public Works Employment Act of 1977¹⁵³ that required that ten percent of all expended funds be spent on minority-owned businesses, unless that turned out to be infeasible. Chief Justice Burger’s opinion, joined by Justices White and Powell, was very deferential to Congress and refused to rely on any of the legal tests in *Bakke*. Instead, Burger pointed out that this program originated under the spending power of the Constitution,¹⁵⁴ an independent grant of power to Congress that reaches as far as any of the regulatory powers of

150. 438 U.S. 265 (1978).

151. *Id.* at 317.

152. 448 U.S. 448 (1980).

153. Pub. L. No. 95-28, 91 Stat. 116.

154. U.S. CONST. art. I, § 8, cl. 1.

Congress, such as the commerce power.¹⁵⁵ The commerce power, said Burger, clearly gives Congress the power to regulate prime contractors on federally funded projects. As to state and local governments, section 5 of the fourteenth amendment provides enabling power. When legislating to remedy lingering effects of discrimination, "Congress, of course, may legislate without compiling the kind of 'record' appropriate with respect to judicial or administrative proceedings."¹⁵⁶ But Burger did point out that Congress had data on disparity of contract procurement at federal as well as state and local levels, from which it could conclude that this regulation was needed. Burger was clearly worried about the thinness of the factual record, but he pushed the worries aside with references to the power of Congress in this area.

Justice Marshall, joined by Brennan and Blackmun, concurred in the judgment. Marshall argued, on the basis of his *Bakke* opinion, for middle-tier scrutiny of explicit racial classifications that disadvantage whites; the classification for "remedial purposes [must] serve important governmental objectives" and must be "substantially related to achievement of those objectives."¹⁵⁷ Congress had more than enough data from which to conclude that the small percentage of federal construction dollars was the product of prior discrimination, and the ten-percent set aside was closely related to eradicating the effects of discrimination, said Marshall.

At the start of his analysis in *Metro Broadcasting*, Justice Brennan cited *Fullilove* for a general presumption in Congress's favor.¹⁵⁸ Next, Brennan found that "programming diversity" represents an important governmental interest that could potentially support constitutional preference policies. The government must license and regulate broadcasting, argued Brennan, because broadcasting, unlike other media, is plagued by scarcity.¹⁵⁹ Broadcasters hold their licenses only as fiduciaries for the

155. *Fullilove*, 448 U.S. at 474-75.

156. *Id.* at 478.

157. *Id.* at 519.

158. *Metro Broadcasting*, 110 S. Ct. at 3008.

159. *Id.* at 3010. The scarcity rationale has recently come under intense attack from both the bench and commentators, leading to speculation that the current system of broadcasting regulation might be declared unconstitutional. See generally Spitzer, *The Constitutionality of Licensing Broadcasting*, 64 N.Y.U. L. REV. 990 (1989) (providing a skeptical critique of the arguments for licensing). Brennan's declaration of scarcity's legitimacy reduces the likelihood that broadcasting regulation will be held unconstitutional in the near future.

The Court could have reached much the same conclusion without relying on the widely discredited scarcity theory. Instead, the Court could have held that the federal government has enough of an ownership interest in the airwaves to give it a speech interest in the content of broadcasting. For

public, and it is the right of the public to have the medium function consistently with the "ends and purposes" of the first amendment that are paramount. In a natural corollary, the government has a strong interest in enhancing broadcast diversity, and this interest is important enough to support minority preferences. Brennan appealed to Justice Powell's opinion in *Bakke*, which held that school admissions processes that used race as one of several criteria of desirability could be constitutional because such admissions processes promote "diverse student" bodies.¹⁶⁰ Diverse student bodies helped to promote a robust exchange of ideas and were, for Powell, a compelling state interest. In a similar fashion, broadcast diversity also "serves important First Amendment values."¹⁶¹

Next, Brennan moved on to the question of whether there exists a "substantial relationship" between broadcast diversity and minority preference policies. Congress and the FCC, declared Brennan, enjoy a strong presumption of expertise on the complex factual question about the connection between ownership characteristics and programming choices.¹⁶² On several occasions the FCC found that minority ownership increases broadcast diversity, and these findings were consistent with the FCC's long-standing policy of trying to influence diversity by controlling the ownership of broadcasting licenses. Brennan was extremely deferential to the FCC on this score.¹⁶³ First, Brennan refused to look behind the FCC's "findings" to examine the Commission's data. When courts take a more skeptical attitude they will examine underlying data.¹⁶⁴ Second, the majority accepted a straightforward analogy between the Commission's multiple-ownership rules—the prior attempt to influence diversity

a sophisticated working-out of the implications of the government having speech interests, see Shiffrin, *Government Speech*, 27 UCLA L. REV. 565 (1980). Shiffrin applies his ideas to broadcasting in *id.* at 581-88, 644-45.

160. *Regents of the University of California v. Bakke*, 438 U.S. 265, 311-13 (1978).

161. *Metro Broadcasting*, 110 S. Ct. at 3001. For a good discussion of how this represents a radical break from prior first amendment doctrine, see Eule, *Promoting Speaker Diversity: Austin and Metro Broadcasting*, 1990 Sup. Ct. Rev. — (forthcoming).

162. *Metro Broadcasting*, 110 S. Ct. at 3011.

163. By characterizing Brennan's opinions as deferential to, or perhaps quite friendly to, the FCC and Congress, I intend neither any accolade nor any criticism. It is just my impression of the treatment Brennan accorded to the FCC and to Congress.

164. See *Craig v. Boren*, 429 U.S. 190 (1976); see also *Century Communications v. FCC*, 835 F.2d 292 (D.C. Cir. 1987) (characterizing FCC regulations as based on dubious assertions rather than substantial evidence), *cert. denied*, 486 U.S. 1032 (1988); *Quincy Cable TV v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985) (Evidence did not support the FCC's claim that regulations were necessary to protect the economic health of local broadcast television.), *cert. denied*, 476 U.S. 1169 (1986); *HBO v. FCC*, 567 F.2d 9 (D.C. Cir. 1977) (Mathematical models and scanty facts did not prove the existence of a problem justifying FCC regulation.), *cert. denied*, 434 U.S. 829 (1977).

by controlling ownership—and minority preference policies.¹⁶⁵ The multiple-ownership policies attempt to increase broadcast diversity by increasing the *number* of separate entities owning broadcasting stations, without regard to their other characteristics. So, for example, the multiple-ownership rules prevent anyone from owning more than one television station in the same city.¹⁶⁶ The rationale for these rules is that more voices will increase the number of views on issues of public importance (as well as make the market for advertising time more competitive).¹⁶⁷ But nothing about these rules categorizes broadcasting by racial or ethnic point of view or claims that a nexus exists between ethnicity, race, or sex and broadcast diversity. Brennan's refusal to see any of these potential distinctions between the multiple-ownership rules and the minority preference policies stemmed directly from his deferential attitude.

Next, Brennan reviewed Congress's findings that minority ownership increases broadcast diversity, extending Congress every presumption and refusing to see potential problems. Brennan counted a great volume of testimony and documentary evidence presented to Congress over the past twenty years in other contexts as support for the preference policies. Ambiguous evidence culled from bills that failed to pass was listed as clear support for Congress's finding of a connection,¹⁶⁸ and the modern record was characterized in the most favorable light.¹⁶⁹

The nexus between ownership characteristics and programming choices is not the same thing as impermissible stereotyping, Brennan assured, because the nexus is only *statistical*, rather than an assertion that

165. *Metro Broadcasting*, 110 S. Ct. at 3012 n.16.

166. *National Citizens Comm. for Broadcasting v. FCC*, 436 U.S. 775 (1978).

167. *Lago, The Price Effects of Joint Mass Communication Median Ownership*, 16 ANTITRUST BULL. 789 (1971); *Owen, Newspaper and Television Joint Ownership*, 18 ANTITRUST BULL. 787 (1973).

168. For example, Justice Brennan lists Congress's refusal to pass a bill that would have eliminated comparative hearings in broadcast-license renewals. Congress heard testimony that comparative hearings at renewal time gave minorities a chance to get into the broadcasting business. *Metro Broadcasting*, 110 S. Ct. at 3013 n.17. The problem with this sort of evidence is that Congress may have completely rejected this testimony and refused to pass the bill for another reason. In fact, Congress did not proceed with the bill because the FCC adopted a renewal policy, ultimately overturned in *Citizens Communication Center v. FCC*, 447 F.2d 1201 (D.C. Cir. 1971), that adopted the bill's restrictions on renewal challenges. Once we understand these facts—that the bill was enacted by administrative order, that Congress lost interest at that point, and that there was no Congressional move to reinstate true comparative-renewal challenges after the FCC's move to cloak them off—it seems much more likely that Congress *rejected* the testimony to which Brennan refers.

169. For example, the CRS study's language suggesting that there is some support for the nexus was not quoted. Instead, Brennan quoted Senator Hollings saying that the study "clearly demonstrates that minority ownership of broadcast stations does increase the diversity of viewpoints presented over the airwaves." *Metro Broadcasting*, 110 S. Ct. at 3016.

all owners of a certain type would program in a certain way. Congress's and the FCC's conclusion that this statistical nexus exists is supported "by a host of empirical evidence."¹⁷⁰ Brennan's review of the data revealed all the deference to Congress that his earlier pronouncements suggested he would extend.¹⁷¹ Furthermore, much of the evidence pertained to treatment of news and public affairs or concerned the hiring practices of minority owners on the theory that minority employees would program differently than white employees.¹⁷²

The "substantial relationship" prong of the test requires the Court to ask if the challenged policies are too costly in any of several ways. First, there must be no alternative policy that will accomplish the purposes of the challenged laws at a much lower cost. Brennan reviewed the history of FCC attempts to encourage diversity without resort to explicit racial classification. Brennan recounted the "Blue Book's" requirement in 1946 that licensees program unsponsored matter, the FCC's increasing emphasis on ascertainment of community needs throughout the 1960s, culminating in the draconian *Primer on Ascertainment of Community Problems by Broadcast Applicants*¹⁷³ in 1971, and the denial of licenses for failure to adequately learn of the needs and interests of minority listeners.¹⁷⁴ Because the FCC had tried alternatives in the past and found them wanting, it was justified in resorting to racial classifications.¹⁷⁵ In the footnotes Brennan confronted the much thornier questions of whether the FCC might better encourage diversity either by directly requiring diverse programming¹⁷⁶ or through untried race-neutral alternatives. Brennan danced lightly around the issue of directly requiring diverse programming, first claiming that any such direct requirement would produce huge administrative burdens because of the FCC's need to learn the needs of communities and to monitor broadcaster performance. Second, any FCC policy requiring diverse programming might

170. *Id.* at 3017.

171. Brennan accepted the CRS study's conclusions and figures without looking to see if the data might be worthless or if the conclusions followed from the data. *See id.* at 3017 n.31. He also cited the working paper upon which this Article is based, M. Spitzer, Justifying Minority Preferences in Broadcasting 19-29 (California Institute of Technology Working Paper No. 718, 1990), *cited in Metro Broadcasting*, 110 S. Ct. at 3017 n.31. Although the parenthetical after the cite is accurate enough, my paper hardly supports the ringing, unequivocal statement in Brennan's text.

172. *Metro Broadcasting*, 110 S. Ct. at 3017-18 nn.32-34.

173. 27 F.C.C.2d 650 (1971).

174. *Metro Broadcasting*, 110 S. Ct. at 3019-21.

175. *Id.* at 3022.

176. *Id.* at 3019 n.36.

raise "serious first amendment issues."¹⁷⁷ Next, Brennan turned aside any suggestion that other, race-neutral alternatives must be tried instead of the minority preference policies, and he did so on grounds of almost pure deference: "The Commission has . . . concluded that these [race-neutral] efforts cannot substitute for its minority ownership policies."¹⁷⁸

Last, Brennan turned to a constellation of considerations that usually get lumped together under the "substantial relationship" inquiry. First, laws including explicit racial classifications are supposed to be of limited duration and undergo reevaluation at regular intervals. These evaluations are supposed to reveal when the program is no longer needed.¹⁷⁹ The minority preferences passed muster because they were included in periodic appropriations legislation, because the FCC was to monitor the situation,¹⁸⁰ and because the goal of programming diversity would stop justifying the program whenever "sufficient diversity has been achieved."¹⁸¹ Second, Brennan found that the challenged policies placed no undue burdens on innocent nonminorities. Nonminority applicants for licenses had no legitimate expectation of gaining the license in a race-neutral process.¹⁸² Last, in a footnote, the majority confronted the most disturbing contention—that the minority preferences had been used by nonminorities who conspired with minority frontmen to fool the FCC and gain the advantages under the policies. Brennan's response rested on the FCC's duty to detect sham filings but did not investigate the utility of the FCC's watchdog function. A more skeptical majority might have

177. *Id.* Brennan apparently believed that one problem with the direct requirement of diversity was that the government must define various viewpoints and then determine which were under-represented. *Id.* The virtue of the minority-preference policies is that they avoid all this. *Id.* at 3021-22 n.40. But Brennan nowhere explained how the government could know whether or not its policy was working without performing exactly these functions. This is just one more bit of evidence that Congress and the FCC received very friendly treatment from the majority.

For an analysis of the debate between Brennan and O'Connor on the first amendment issue involved in directly requiring diversity, see Eule, *supra* note 161.

178. *Metro Broadcasting*, 110 S. Ct. at 3022-23 n.42. The need for deference was increased, claimed the majority, by the FCC's and Congress's consideration and rejection of other measures designed to aid minorities in broadcasting. *Id.* at 3023.

179. *Id.* at 3022.

180. Actually, the FCC has been directed to report on the efficacy of the minority preferences contained in the *lottery* statute. *Id.* at 3025. It is one more mark of the majority's friendly treatment of these preferences that the report on the lottery was listed among the devices for monitoring the comparative-hearing preference and the distress-sale policy.

181. *Id.*

182. A subsidiary issue is whether the distress-sale policy places too much of a burden on nonminorities who are completely excluded from consideration from stations sold in distress sales. The comparative hearing, in contrast, makes race one factor among many. Brennan turned aside this challenge, arguing that only a few stations were subject to distress sales and that nonminority applicants could apply for other licenses. *Id.* at 3027.

inquired into the adequacy of the FCC's monitoring to date or even into the possibility of monitoring these problems. Brennan, however, was deferential.¹⁸³

C. THE DISSENT

Justice O'Connor, writing in dissent for Chief Justice Rehnquist and Justices Scalia and Kennedy, disagreed with just about everything in the majority opinion. Starting with the principle that the Constitution prevents Congress from granting or denying property rights to "individuals based on the assumption that race or ethnicity determines how they act or think,"¹⁸⁴ O'Connor required that all racially explicit classifications pass strict scrutiny. The government must have a compelling interest (not merely an important one), must need to use racial classifications, and must narrowly tailor the classifications to achieve the compelling interest (rather than merely produce a substantial relationship between the interest and the classification).¹⁸⁵ The Court, O'Connor argued, recently held in *Richmond v. J.A. Croson Co.*¹⁸⁶ that state programs using racial classifications must pass extremely strict scrutiny and Congress must, in general, be subject to the same strict standard.¹⁸⁷

In *Croson*, the city of Richmond, Virginia, adopted a five-year plan requiring all prime contractors other than those owned by minorities to subcontract at least thirty percent of the dollar amount of any contracts with Richmond to minority business enterprises ("MBEs").¹⁸⁸ Witnesses

183. *Id.* at 3025 n.48. Again, my characterization of Brennan as deferential is intended to suggest neither approval nor disapproval.

Justice Stevens concurred, emphasizing that "racial or ethnic characteristics provide a relevant basis for disparate treatment only in extremely rare situations." *Id.* at 3028. I would make more of this concurrence had Justice Brennan not resigned during the preparation of this Article. I think Justice Brennan's replacement is so likely to make a difference in all future affirmative action cases that speculating upon the limits of Justice Stevens's willingness to go along with the liberal position is beside the point.

184. *Id.* at 3029 (O'Connor, J., dissenting).

185. *Id.*

186. 488 U.S. 469 (1989).

187. *Metro Broadcasting*, 110 S. Ct. at 3029-30 (O'Connor, J., dissenting). O'Connor conceded that Congress had greater powers under section 5 of the fourteenth amendment. But that section allowed Congress to move to remedy racial discrimination by the states. The policies at issue here were entirely creatures of the federal government and were not intended as remedial measures, O'Connor contended, and hence did not rate the more relaxed review that the Court afforded the set-aside programs in *Fullilove*. *Id.* at 3031-32.

188. An MBE was one owned or controlled at least 51% by minority-group members. A minority was defined as "[c]itizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts." *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 478 (1989).

at the public hearings preceding adoption of the plan introduced considerable evidence of *societal* discrimination in construction contracting but introduced "no direct evidence of race discrimination on the part of the city."¹⁸⁹ J.A. Croson Co., a plumbing contractor that was not allowed to raise its bid by the \$7,663.16 in extra costs occasioned by the higher prices quoted by the only MBE subcontractor who was willing to bid on the project, sued Richmond, claiming that the thirty-percent plan violated the fourteenth amendment of the Constitution.

Justice O'Connor, joined only by Chief Justice Rehnquist and Justice White, distinguished *Fullilove* by pointing out that that case's validation of explicit racial classifications rested on the "unique" remedial powers of Congress under section 5 of the fourteenth amendment.¹⁹⁰ Next, O'Connor, joined by Rehnquist, White, and Kennedy, reaffirmed a strict scrutiny approach to *all* racial classifications, based in part on a "danger of stigmatic harm," but also based on the perception that this thirty-percent plan was nothing more than racial pork barrel for the politically *dominant* black majority in Richmond.¹⁹¹ Then, joined also by Stevens (and therefore comprising a majority), O'Connor found that general discrimination in the construction industry did not provide a compelling government reason for an explicit racial classification.¹⁹²

189. *Id.* at 480.

190. The fourteenth amendment reads, in part, as follows:

Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

. . . .

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provision of this article and the flexibility built in to the 10% set aside by the administrative procedures for waiver.

U.S. CONST. amend. XIV, §§ 1, 5. Section 5 of the fourteenth amendment gives Congress broad authority "to identify and redress the effects of society-wide discrimination" but gives no such authority to state and local governments, who are bound by section 1 of the fourteenth amendment. *Croson*, 488 U.S. at 490. In effect, argued O'Connor, power was reallocated from the states to Congress by section 5. Hence, *Fullilove* could be distinguished, for Congress has much greater power than a city. For Richmond to prevail, it would at least have to show that it had become a "passive participant" in race discrimination by the local construction industry and was now attempting to remedy its involvement in discrimination. *Id.* at 492.

191. "In this case, blacks comprise approximately 50% of the population of the city of Richmond. Five of the nine seats on the City Council are held by blacks." *Id.* at 495.

192. O'Connor listed the five findings of fact that the district court had found to justify remedial action:

(1) the ordinance declares itself to be remedial; (2) several proponents of the measure stated their views that there had been past discrimination in the construction industry; (3) minority businesses received 0.67% of prime contracts from the city while minorities constituted 50% of the city's population; (4) there were very few minority contractors in local and state contractors' associations; and (5) in 1977, Congress made a determination that

Instead, O'Connor appeared to demand evidence of something "approaching a prima facie case of a constitutional or statutory violation" by someone in the Richmond construction industry.¹⁹³

Justice Kennedy, concurring in part in *Croson*, was openly skeptical of the argument about section 5 of the fourteenth amendment giving Congress greater power to use racial classifications than the states have. He also expressed support for Scalia's argument that race may *never* be used for anything other than a remedy. Justice Scalia, concurring in *Croson*, decried the use of race for nonremedial purposes, and he almost entirely embraced O'Connor's theory of section 5 of the fourteenth amendment to distinguish *Fullilove*.¹⁹⁴

In *Metro Broadcasting* the dissenters argued that the minority preference policies fail strict scrutiny. First, the goal for broadcast diversity is neither compelling nor even important. Such a goal is so amorphous as to lend itself to abuse, both as a justification for a program with potentially infinite life and as a justification for discriminating against almost anyone.¹⁹⁵

The policies also fail because they are not narrowly tailored, claimed O'Connor. The use of a statistical relationship between race and programming is unlawful because the government should not presume that race causes conduct, particularly when there are other, more direct methods of accomplishing the goals.¹⁹⁶ The dissenters regarded the majority's reliance upon a statistical nexus as particularly galling because the Constitution requires that the relationship between race and conduct be nearly perfect. Against this standard, the evidence fails to support the

the effects of past discrimination had stifled minority participation in the construction industry nationally.

Id. at 499. She then refuted each of them, at length, showing that they were insufficient to support an explicit racial classification. *Id.* at 500-505.

193. *Id.* at 500. Note that the list of evidence in *Croson* was not much less than Congress had in *Fullilove* when it justified the 10% set-aside. So, for at least Stevens and Kennedy, and perhaps also for O'Connor, Rehnquist, and White, there was a strong hint of a new willingness to examine legislative fact finding, at least at the state and local level.

There was, simultaneously, a trend of reducing the scope of federal civil rights laws. See *Martin v. Wilks*, 490 U.S. 755 (1989) (allowing litigation of racially explicit consent decrees designed to remedy past discrimination where litigants were not parties to original action); *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (refusing to apply 42 U.S.C. § 1981 to employer conduct after the formation of the employment contract); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) (requiring plaintiffs to shoulder heavier burdens when proving a "disparate-impact" case under title VII).

194. *Croson*, 488 U.S. at 520-24.

195. *Metro Broadcasting*, 110 S. Ct. at 3034-35. The dissent also suggested that the goal of choosing among viewpoints might violate the first amendment. *Id.* at 3036.

196. *Id.* at 3037-40.

policies. Congress stopped the FCC's investigation of the relationship between race and programming choices. Congressional declarations that the nexus existed were irrelevant, and the legislative reports that "claim some nexus to exist refer to sources that provide no support for the proposition."¹⁹⁷ In sum, the dissenters were extremely skeptical of Congress and its data.

D. THE OPINIONS' USE OF EVIDENCE OF THE NEXUS AND AN ALTERNATIVE

The opinions in *Metro Broadcasting* addressed many issues, but the most important ones involved the appropriateness of intermediate or strict scrutiny in cases of benign discrimination; the role of nonremedial governmental interests, such as diversity in broadcasting or diversity in student bodies, as important or compelling governmental interests; and the panoply of issues included in the substantial relationship (or "narrowly tailored" and "necessary" in the case of strict scrutiny) inquiry, including the quality of evidence needed to sustain a governmental program. I take no position on the appropriateness of intermediate or strict scrutiny in cases of benign discrimination. I will presume, for the sake of analysis, that broadcast diversity is an important or compelling government interest. I focus solely on the third set of issues, particularly the quality of evidence needed to sustain a governmental program.¹⁹⁸

I will focus briefly on the question of the evidence at the core of the substantial relation issue (or "narrowly tailored" and "necessary" issues in the case of strict scrutiny) in order to make three straightforward points: (1) The evidence cannot be said to establish (or disprove) the nexus between ethnicity, race, or sex and broadcast content as a matter of pure fact. Instead, the normative presuppositions and jurisprudential approach largely determine the Court's evaluation of the data. (2) The majority and dissent's treatment of the evidence on the nexus reveal that

197. *Id.* at 3043. Justice O'Connor also found that the minority preference policies put undue burdens on individual nonminorities. *Id.*

Justice Kennedy, joined by Justice Scalia, also wrote a separate, scathing dissent in which he compared the majority opinion to the "separate but equal" doctrine in *Plessy v. Ferguson*, 163 U.S. 537 (1896). *Metro Broadcasting*, 110 S. Ct. at 3044.

198. For what it is worth, I believe that *Metro Broadcasting*, when read next to the other affirmative action cases, establishes that federal programs will be treated with far more deference on virtually every legal issue than will state or local programs. Further, the most interesting issues for the immediate future will concern the degree to which federal power to discriminate benignly can be explicitly delegated to state and local governments and what degree of ongoing active supervision, similar to the requirement for state action immunity in antitrust, will be required. But I have no great insights on these concerns.

the majority applied a very deferential form of intermediate scrutiny and that the dissent adopted a very skeptical version of strict scrutiny. (3) There is a level of review that lies between the majority's deference and the dissent's skepticism, and this truly intermediate review would lead the Court to demand a different form of minority preferences.

The majority and dissent had two wildly different views of the sufficiency of the evidence of a nexus between ownership characteristics and programming choice. Not only did the majority and dissent differ over their appraisal of the evidence, but they also differed over which institution should decide, as a matter of first course, how good the evidence was. The majority showed great deference to Congress, in effect giving the job of appraising the evidence to Congress and its agent, the FCC. The dissent would have none of this, implicitly assuming that it was the Court's job. These differences flowed directly from the divergent norms that animated Justice Brennan and Justice O'Connor. Brennan believed that benign discrimination by Congress deserved a highly deferential form of review, but O'Connor regarded all forms of discrimination as potentially invidious and therefore requiring strict scrutiny. Brennan's approach led him to regard the Congressional Research Study, the theories in this Article, the body of literature reviewed in this Article, Congressional declarations, data on hiring practices, and so forth as relevant and more than enough to support Congress's use of the minority preferences. In contrast, O'Connor's highly skeptical approach led her to require that the connection between ownership characteristics and programming behavior be almost perfect. None of the evidence purported to show any such thing, so she naturally found the data completely unsatisfactory.

There is a middle ground between the extremely deferential majority approach that regards virtually any evidence as sufficient and the extremely skeptical dissenting approach that requires evidence of a perfect relationship between ownership characteristics and programming. This true intermediate approach could be fashioned in any number of ways, but for our purposes we will assume that it uses the same legal formulation as Justice Brennan's opinion: A benign racial classification must bear a substantial relationship to an important governmental purpose. We will further assume that broadcast diversity can be an important governmental purpose. However, on the question of substantial relationship, a true intermediate approach might demand a much better fit between the goal and the explicit racial classifications.

To understand the sorts of demands that might be made under the question of substantial relationship, we must distinguish between the quality of the evidence and that which the evidence goes to establish. In the case of minority preferences in broadcasting, we might say, for example, that in the Los Angeles market, awarding a new radio license to a black owner produces a twenty-percent chance that the radio station will aim for the black audience but that awarding the radio license to a white owner produces only a five-percent chance that the new radio station will aim for the black audience. We might make such a statement for either of two reasons. The basic theory of radio programming might suggest that a new black owner is only twenty percent likely to serve the black audience and that a white owner is only five percent likely to serve the black audience, while our evidence for applying the theory in this circumstance might be excellent. Or our theory might suggest that the correlation between race and programming is nearly perfect, but we might have very weak evidence to suggest applying the theory. In the case of minority preferences, the substantial relationship issue had both problems. The basic theory suggested only a probabilistic relationship, and the data proving the theory were less than overwhelming.

A truly intermediate substantial relationship test could require two things. First, it could demand better evidence that the fundamental theory for the relationship between ethnicity, sex, and programming content is true. A more sophisticated, completed version of the CRS survey would be a good start. Second, minority preferences could be reformulated in ways that use the central insight produced by Part II of this Article: Minority preferences are not always equally likely to produce increases in broadcast diversity. In certain market settings, broadcasting minority programming is much less expensive than in other settings. To tailor the relationship between minority status and broadcast programming, the law could accord an applicant (or buyer) seeking to make use of the minority preferences a hearing at which the issue would be, What is the likelihood that the exercise of a minority preference in this particular case will increase diversity in programming? The parties would be allowed to present evidence on the factors that theory suggested were most important: Is there a substantial minority population in this market? Is the minority population currently unserved? How many outlets are there in the market? What is the cost of minority programming versus nonminority programming? In this way, the new policy would be keyed directly to the theory of the market and would increase the probability that minority preferences would produce broadcast diversity.

Under a level of scrutiny that is intermediate between that of the majority and that of the dissent, the reformulated minority preferences might survive.¹⁹⁹

None of this has been intended to show that the nexus *really* does or does not exist. Nor has any of the discussion been intended to suggest that the minority preference policies are good or bad. Instead, this discussion has attempted to suggest that the Court's normative presupposition and jurisprudential approach largely determine the Court's view of the evidence. In addition, it is possible to reformulate the minority preferences; applicants could attempt to show that they are very likely to contribute to broadcast diversity. There is an intermediate position on the issue of substantial relationship (or necessity and narrow tailoring) that corresponds to the reformulated minority preferences. The existence of this intermediate position in turn reveals the extent to which the majority in *Metro Broadcasting* deferred to Congress while the dissent exercised extreme skepticism.

V. CONCLUSION

Do minority station owners program differently from white owners? The simplest theory—that minority and white owners both maximize the profit potential of a given market—suggests that they behave the same way. Other theories, based either on the value to owners of programming for their own group or on the value of minority principal/minority agent cost savings, suggest that minorities and whites may program differently. This is particularly likely in markets with large numbers of minorities in the audience, where there are large numbers of broadcasting stations, and where none of the stations are yet serving minority audiences. In markets that do not satisfy one or more of these conditions, the theoretical chance that a minority owner will program differently from a white owner declines. The evidence, such as it is, could be consistent with any hypothesis. Certainly no strong presumption in favor of any theory would be disturbed by the evidence.

Metro Broadcasting indirectly confirmed this view of the theory and evidence. The majority, adopting an extremely deferential version of intermediate review, indulged a strong presumption in favor of the causal nexus between minority status and programming choices. For the majority, the evidence reviewed in this Article and elsewhere provided more

199. This is, in essence, the FCC position that was rejected in *TV 9 v. FCC*, 495 F.2d 929 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974).

than enough of a record to justify the minority preference policies. The dissent, however, took the opposite point of view. Racially explicit laws were viewed with great suspicion and had to overcome strong presumptions against their legitimacy. Nothing in the theory or evidence came close to satisfying the dissent's highly skeptical version of strict scrutiny.